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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1932

No. 272

NORWEGIAN NITROGEN PRODUCTS COMPANY,
PETITIONER,

vs.

THE UNITED STATES

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CUSTOMS AND PATENT APPEALS

PETITION FOR CERTIORARI FILED AUGUST 1, 1932

CERTIORARI GRANTED OCTOBER 17, 1932

(36,969)

(36,969)

SUPREME COURT OF THE UNITED STATES

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United States Court of Customs and Patent Appeals

Customs Appeal No. 3454

NORWEGIAN NITROGEN PRODUCTS COMPANY,
Appellant,

vs.

THE UNITED STATES, *Appellee.*

Petition for Review.

To the Honorable the United States
Court of Customs and Patent Appeals:

The Norwegian Nitrogen Products Company, a corporation duly organized under the laws of the State of New York, the appellant above named, hereby applies to the United States Court of Customs and Patent Appeals for a review of the questions of law and fact involved in the decision and judgment of the United States Customs Court, First Division, dated April 21, 1931, overruling Protests 92852-G, etc., being and including all other protests included by and within the record of said case, the subject of said decision and judgment as by the said record shown, filed by the appellant, and complains of the following errors of law and fact involved in said decision and judgment.

Assignment of Errors.

1. That the said United States Customs Court erred in overruling said protests and every and all thereof.

2. That said United States Customs Court erred in not sustaining said protests and every and all thereof.

3. That said United States Customs Court erred in holding the testimony offered by appellant therein incompetent and irrelevant, or either incompetent or irrelevant, to the issue or the issues involved in the said case made as aforesaid.

4. That the said United States Customs Court erred in sustaining the objections of the Government to said testimony, or to any part thereof, and in granting the petition of the Government to strike out said testimony and any part thereof.

5. That the said United States Customs Court erred in affirming the judgment or decision of the Collector in each and every one and as to any part of said protests.

6. That the said United States Customs Court erred in holding and deciding that the Presidential Order increasing the rate of duty upon sodium nitrite, when imported into the United States, from three to four and one-half cents per pound, as shown by the evidence in said case and provided by the said Presidential order, was not an order entering into the rate or amount of duty as assessed by the Collector in each and all of the said cases subject to said protests, as provided in Sec. 514 of the Tariff Act of 1922.

7. That the said United States Customs Court erred in holding that said court was foreclosed from and did not have the legal right because of the Presidential order herein, or for any reason, of inquiry and decision whether or not the Tariff Commission had legally pursued the law in preparing and making its report to the President upon which said Presidential order was predicated.

8. That said United States Customs Court erred in not holding and deciding that the United States Tariff Commission had not legally pursued the law and duly promulgated regulations relevant to their procedure herein, and had not, therefore, made any legal or valid report in said matter to the President.

9. That said United States Customs Court erred in holding that the United States Tariff Commission was not

bound to pursue the law in its report to the President in order that the Presidential order should be legal and valid.

10. That the said United States Customs Court erred in holding that said protest or protests did not put in issue herein the legality of the Presidential order herein.

11. That the United States Customs Court erred in holding that any language or recital of the Presidential order herein did or could foreclose inquiry by said court into and decision thereby as to the legality of said order or jurisdiction or power of the President to make or proclaim the same.

12. That the said United States Customs Court erred in not holding and deciding that before the President had power or jurisdiction to make or proclaim said or any legal Presidential order, increasing said duties as aforesaid, there must have been submitted to the President a legal and valid report of said Tariff Commission made and submitted in pursuance of the law and the duly promulgated regulations of the President and the said Commission as to the procedure of said Commission.

13. That the said United States Customs Court erred in holding said report of said Commission valid or legal or in that in making the same the said Commission had not pursued the law and the Presidential order and its duly promulgated regulations.

14. That the said United States Customs Court erred in not holding said Presidential order illegal and void and that at the time of its making and proclamation the United States Tariff Commission had not submitted to the President a legal, valid, or in consequence any report upon said subject-matter to the President "according to law" or as by the law and said regulations required.

15. That the said report of the Tariff Commission made to the President was illegal and void.

16. That the said Presidential order and proclamation was illegal and void.

17. That said decisions of the Collector were, and each thereof was, illegal and void.

18. That the reason for the last three assignments of error is because in no one of the same had the statutory prerequisites thereto been had or made or exercised.

19. That said United States Customs Court had and has full and complete power and jurisdiction to review and decide all the foregoing issues and assignments of error.

20. That the said decision and judgment of the said United States Customs Court should be reversed and judgment herein rendered by this Honorable Court directing accordingly that each and all of the protests herein involved and the subject hereof be sustained.

Wherefore Appellant prays that said decision and judgment of said United States Customs Court be reversed and reviewed by this Honorable Court, and to that end the record and all papers and exhibits therein and relating to the protests thereby included be caused to be certified to this Honorable Court.

Dated Washington, D. C., June 8, 1931.

THE NORWEGIAN NITROGEN PRODUCTS COMPANY,
Appellant,
By DE VRIES, CRAWFORD & McCOOK,
Attorneys for Appellant.

Office and Post Office Address: 723 Southern Building, Washington, D. C.

Indorsed: United States Court of Customs and Patent Appeals. Filed Jun. 9, 1931. Arthur B. Shelton, Clerk.

Stipulation.

UNITED STATES CUSTOMS COURT.

Appeal 3454.

NORWEGIAN NITROGEN PRODUCTS COMPANY, *Appellant,*

v.

THE UNITED STATES, *Appellee.*

It is hereby stipulated by and between Charles D. Lawrence, Esquire, Assistant Attorney General of the United States, Attorney for the Appellee, and De Vries, Crawford & McCook, Attorneys for the Appellant, by and with the

approval of the Court, that the printing of the record may be diminished to the following extent:

That only that part of the stenographic record of the hearing before the United States Customs Court on page 27 marked "a", only that part on page 56 marked "a", and only that part on page 58 marked "b", together with all following shall be printed as a part of the record.

It is further hereby stipulated and agreed that all portions of said record, save the final orders of the Court and Judges thereof, relating to the transfer of said case from New York to Washington, D. C., for hearing may be omitted from the printed record.

It is further hereby stipulated and agreed that that portion of Exhibit 7, commencing with line 6, page 178, and extending to and including line 2, page 252, and all that portion of said Exhibit 7 commencing with line 9, page 255, to and including line 15, page 267, may be omitted from the printed record, proper designations of the omissions being noted in the printed record.

It is further hereby stipulated and agreed that any part or portion of the record which it is hereby agreed shall not be printed in the record may be used by either party in the oral argument of this case.

M. HIGGINBOTHAM,
For Assistant Attorney General,
Attorney for the Appellee.

DE VRIES, CRAWFORD & McCOOK,
By MARION DE VRIES,
Attorneys for the Appellant.

Dated at Washington, D. C., September 15, 1931.

Indorsed: United States Court of Customs and Patent Appeals. Filed Sep. 15, 1931. Arthur B. Shelton, Clerk.

Return to Court of Customs and Patent Appeals.

UNITED STATES CUSTOMS COURT.

Appeal 3454.

NORWEGIAN NITROGEN PRODUCTS COMPANY, *Appellant,*

v.

THE UNITED STATES, *Appellee.*

The petitioner above named, having applied to the United States Court of Customs and Patent Appeals for a review of

the questions of law and fact involved in a decision of the United States Customs Court in the above case, and the said Court having ordered this Court to transmit to said Court the record, evidence, exhibits, and samples, together with a certified statement of the facts involved in the case and its decision thereon:

Now, therefore, pursuant to said order, the United States Customs Court does hereby transmit to said Court of Customs and Patent Appeals the record, evidence, exhibits, and samples in said case, together with a certified statement of the facts involved in the case, and also its decision thereon.

This return specifically comprises the following:

A copy of—

1. Protests 92852-G/11125 and 128620-G/50885 with the reports of the collector of customs and the United States appraiser's answers to protests.

2. The proceedings of November 8, 1928.

3. Motion and order to transfer hearing.

4. Motion to dismiss protest 92852-G.

5. Notice of appearance.

6. Stipulation of counsel.

7. The proceedings and testimony of November 24, 1930.

8. Exhibits 1 to 16 referred to in the testimony.

9. The decision in question, T. D. 44824, and judgment order.

The entry papers will be forwarded later.

Witness the Honorable Presiding Judge of the United States Customs Court this 1st day of July, A. D. 1931.

[SEAL.] J. W. DALE,
Clerk.

Tariff Commission hearing—Sodium nitrite.

Protest 92852-G/11125.

Copy.

8891.

Norwegian Nitrogen Products Co., Inc., 17 State Street, New York.

FEBRUARY 24, 1925.

Collector of Customs,
Custom House,
New York City.

DEAR SIR:

We hereby protest against your liquidation and assessment of duty at the rate of 4½¢ per pound on certain Nitrate of Soda ex S/S "United States" October 15th, 1924, entry No. 764654 liquidated on the 24th of February, 1925.

We claim that this merchandise is entitled to entry at the rate of 3¢ per pound under paragraph 83, Tariff Act of 1922, and that your action in assessing any other or higher rate of duty is illegal and without due warrant of law.

It is requested that all notices relating to this protest be sent to our attorneys, De Vries, Doherty, Davis & Lamb, 120 Broadway, New York.

Respectfully,
NORWEGIAN NITROGEN PRODUCTS CO., INC.,
T. LODRUP,
President.

Report of the Collector.

#11125.

MAY 4, 1925.

Respectfully referred to the Board of U. S. General Appraisers for decision.

The merchandise in question consists of sodium nitrate, entered Oct. 15, 1924.

Duty was assessed at 4½¢ per lb. in accordance with T. D. 40204 and Sec. 315a, Act of 1922. Note the Appraiser's special report, herewith.

The protest was received within the statutory time.

PHILIP ELTING,
Collector.

S.

Indorsed: Mar. 18, 1925. 11125. Norwegian Nitrogen Products Company, Inc. Nitrate of Soda. Entry No. 764654. Received Board of General Appraisers May 7, 1925. D. P. Dutcher, Chief Clerk. Received Custom House, New York, Feb. 26, 1925. The dates of entry, liquidation, and protest are correctly specified herein.

Answer to Protest.

United States Customs Service,

Appraiser's Office, Port of New York.

4/4/25.

Protest No. 11125.
Importer: Norwegian Nitrogen Products Co.
Invoice No.: —.
Entry No.: 764,654.
Date: 10/15/24.

The merchandise in question consists of sodium nitrite. It was returned for duty at the increased rate of 4½¢ per lb. in accordance with the President's proclamation, under Sec. 315 (*a*). Note T. D. 40204.

F. J. H. KRACKE,
Appraiser.

Ex.: BOWEN.

Protest 128620-G/50885.

Duplicate.

Collector of Customs,
(Address:) New York, N. Y.

SIR:

We hereby protest against your liquidation and assessment of duty at the rate of 4½ cents per pound on cer-

tain nitrite of soda ex (name of vessel:) S. S. Bergensfjord, (date:) 12/24/24, entry No. 811,852, liquidated (date:) 7/18/25.

We claim that this merchandise is entitled to entry at the rate of 3 cents per pound under paragraph 83, Tariff Act of 1922, and that your action in assessing any other or higher rate of duty is illegal and without due warrant of law.

That under and by virtue of paragraph 83 of the Tariff Act of 1922 the rate of duty upon sodium nitrite was and is 3 cents per pound; that under and by virtue of the provisions of Section 315 of the Tariff Act of 1922, the President of the United States is authorized and empowered to increase said rate of duty not to exceed 50 per centum, whenever he, the said President of the United States, shall ascertain and proclaim that the difference between the cost of production of sodium nitrite in the principal countries of exportation and that in the United States, is not equalized by the rate of duty prescribed by said paragraph 83, and shall ascertain and proclaim the rate of duty necessary to equalize said differences. That under and by virtue of said Section 315 of the Tariff Act of 1922, it is provided, that the United States Tariff Commission shall assist the President in said ascertainment and make due report to him under such rules and regulations as the President of the United States shall prescribe.

That on October 26, 1922, the President of the United States acting under and by virtue of said authority to promulgate rules and regulations for the enforcement of said Section 315, provided that, with reference to all requests, applications and petitions for action thereunder filed either with the President of the United States or the United States Tariff Commission, that such were thereby "referred to the United States Tariff Commission for consideration and for such decision as shall be in accordance with the law and the public interest under rules and regulations to be presented by such Commission."

Accordingly petition having been filed for an increase of the rate of duty upon nitrite, from 3 to 4½ cents per pound, the United States Tariff Commission proceeded to make investigation of said subject-matter and did make report thereupon to the President of the United States. In

and by virtue of the proclamation thereupon by the President of the United States, it is recited as follows:

> "Whereas in the course of said investigation a hearing was held, of which reasonable public notice was given and at which parties interested were given a reasonable opportunity to be present, to produce evidence and to be heard;"

Your protestant alleges that contrary to the recital in the proclamation by the President, and as therein recited aforesaid, said Commission did not as provided by law and the rules of said Commission during said investigation or at any time give reasonable public notice thereof and did not afford interested parties appearing therein reasonable opportunity either to be present, or to produce evidence, or to be heard, as required by law and the rules of said Commission, wherefore the proceedings of said United States Tariff Commission were and are without authority of law and without jurisdiction and were and are null and void, and, wherefore, there was no investigation of said subject-matter made by said Commission as by the law and the regulations promulgated by the President and the said Commission required.

On the contrary, protestant further alleges that due request was made, and exception taken to the failure of the United States Tariff Commission, to accord this protestant duly appearing therebefore, reasonable opportunity to be present, to produce evidence and to be heard; that being overruled in said request due proceedings were initiated in the Supreme Court of the District of Columbia, to by law compel the said Commission to afford this protestant reasonable opportunity to be present, to produce evidence and to be heard in said proceeding; that while said proceedings were pending in court, and before final adjudication thereof, the said Commission in violation of the jurisdiction of said court, made report to the President of the United States whereupon the aforesaid proclamation was had and made.

Said proclamation of the President further recites concerning said alleged investigation by the United States Tariff Commission:

"And whereas the President *upon said investigation* of said differences in costs of production of said article wholly or in part the growth or product of the United States and of the like or similar article wholly or in part the growth or product of competing foreign countries, has *thereby* found that the principal competing country is Norway and that the duty fixed in said title and act does not equalize the differences in costs of production in the United States and in said principal competing country, namely, Norway, and has ascertained and determined the increased rate of duty necessary to equalize the same."

That your protestant further alleges as a ground for this protest, that upon the face of said proclamation, as was and is in truth and in fact the case, the President of the United States did not as required by Section 315 of the Tariff Act of 1922, himself make investigation into the aforesaid differences of cost of production of nitrite, and in truth and in fact, did not make any investigation whatever thereof as appears by said proclamation, and in truth and in fact, the only investigation made thereupon was by the United States Tariff Commission, and that the proclamation of the President of the United States shows upon its face that the sole and only investigation made of said differences was by the United States Tariff Commission, and that no investigation thereof was made by the President of the United States as by law required, wherefore your protestant alleges that said proclamation by the President of an increase of the rate of duty upon nitrite, from 3 cents per pound as provided in paragraph 83 of the Tariff Act of 1922, was not made in pursuance with the law, was without any jurisdiction whatsoever, and is invalid and void.

Your protestant further alleges upon information and belief as ground for his protest, that the United States Tariff Commission in its report to the President of the United States, which said report and that alone, the President of the United States followed as a basis of his proclamation, took into consideration in estimating the differences of cost of production of nitrite as required by said statute, illegal items, such as costs of transportation and

others, without any authority of law and contrary to the provisions of said Section 315 of the Tariff Act of 1922, wherefore the ascertainment and proclamation of the President of the United States was not made in pursuance of law, was made without jurisdiction of the said subject-matter, and without any jurisdiction whatsoever, and was void and of no effect and the due and only legal rate of duty upon sodium nitrite when imported into the United States is 3 cents per pound and no more.

We further claim that Section 315 of the Tariff Act of 1922, under which the rate of duty on nitrite of soda was increased by Presidential proclamation, from 3 cents per pound to 4½ cents per pound, is unconstitutional and void by reason of the fact that therein and thereby the Congress of the United States has endeavored to delegate to the President of the United States the constitutional power to lay and collect a tax, contrary to the terms and provisions of Article VIII, Section I, Subdivision I, of the Constitution of the United States.

It is requested that all notices relating to this protest be sent to us at our office: 26 Old Slip, New York City, New York.

Respectfully,

NORWEGIAN NITROGEN PRODUCTS CO., INC.,
Per T. LODRUP, *Pres.*

Dated Sept. 9th, 1925.

Report of the Collector.

November 23, 1925.

Respectfully referred to the Board of United States General Appraisers for decision.

Duty was assessed at the rate provided in the Tariff Act of 1922 for imported merchandise of the kind described in the entry or returned by the appraiser on the invoice.

Note the appraiser's special report, herewith.

The protest was received within the statutory time.

PHILIP ELTING,
Collector.

Indorsed: 128,620-G/50885. Norwegian Nitrogen Prod., Inc. Nitrite of Soda. 811,852—12/24/24. Received Custom House, New York, Sep. 17, 1925. The date of entry, liquidation, and protest are correctly specified herein. Received Custom House, New York, Sep. 17, 1925.

Answer to Protest.

United States Customs Service,

Appraiser's Office, Port of New York.

November 4, 1925.

AEL-G.
Protest No. 50885.
Importer: Norwegian Nitrogen Prod., Inc.
Invoice No.: —.
Entry No.: 811,852.
Date: 7/18/25.

The merchandise in question consists of sodium nitrite. It was returned for duty at the increased rate of 4½ cents per pound in accordance with the President's proclamation, under Section 315 (*a*), Act of 1922. Note T. D. 40204.

F. J. H. KRACKE,
Appraiser.

Ex.: BOWEN.

Proceedings Before the Customs Court.

U. S. CUSTOMS COURT, FIRST DIVISION.

Protest No. 92852-G.

NORWEGIAN NITROGEN PRODUCTS CO., *Plaintiff,*

vs.

THE UNITED STATES, *Defendant.*

Sodium Nitrite.

NEW YORK, November 8, 1928.

Before:

Associate Justice MCCLELLAND, presiding.
Associate Justice SULLIVAN.
Associate Justice BROWN.

Appearances:

De Vries & Davis, Esquires, attorneys for the plaintiff, by Marion De Vries, Esq., of counsel.

Charles D. Lawrence, Esq., Asst. Attorney General, attorney for the defendant, by James R. Ryan, Esq., special attorney, of counsel.

Samuel C. Hudnell, Court Reporter.

Mr. Ryan: At the request of Chief Justice Fischer, the court is informed that Chief Justice Fischer has taken the matter under advisement as to the motion to transfer this case to Washington.

Judge De Vries and I have agreed upon a continuance of this case to the December term, subject to the approval of this Court. It is further agreed that all the other cases on this docket on this subject excepting protest 92852-G, which will be the test case, may be suspended pending the final decision in protest 92852-G.

Justice McClelland: Protest 92852-G will be continued to the December term. All the others are ordered suspended pending the decision in protest 92852-G.

Motion and Order to Transfer Hearing.

UNITED STATES CUSTOMS COURT.

NORWEGIAN NITROGEN PRODUCTS CO., *Plaintiff,*

v.

THE UNITED STATES, *Defendant.*

Order Transferring Protest 92852-G, on Sodium Nitrite, to Washington, D. C., for Hearing.

A motion having been made herein by De Vries & Davis, Esqs., attorneys for the plaintiff, for an order transferring protests 92852-G, etc., to Washington, D. C., for hearing, and Chief Justice I. F. Fischer having heard Marion De Vries, Esq., counsel for the plaintiff, in support of the motion, and James R. Ryan, Esq., Special At-

torney for the Government, in opposition, and after due deliberation, and on November 20, 1928, having granted said motion and directed that the trial of the case be conducted before a full bench of the First Division of the Court on a day convenient to the members thereof, and that an order be entered accordingly.

It is therefore ordered that said motion be, and the same hereby is, granted, and that protest 92852-G be transferred to Washington, D. C., for trial before the First Division of this Court sitting in bank.

Witness Honorable I. F. Fischer, Chief Justice of the United States Customs Court, and the Seal of said Court, at the City of New York, this 20th day of November, A. D. 1928.

[Seal United States Customs Court.]

J. W. DALE,
Clerk.

UNITED STATES CUSTOMS COURT.

Protest 92852-G.

NORWEGIAN NITROGEN PRODUCTS CO., *Plaintiff*,

vs.

THE UNITED STATES, *Defendant*.

In the foregoing cause by an Order entered by Honorable I. F. Fischer, then Chief Justice of the United States Customs Court, on the 20th day of November, 1928, it was ordered that the foregoing cause be transferred to Washington, D. C., for trial before the First Division at such time as is convenient to the members thereof. It is therefore

Ordered, that said cause be placed on the docket for trial at Washington, D. C., on the 29th day of October, at 10.30 a. m.

It is further

Ordered, that the Clerk of the United States Customs Court notify each of the parties to his suit by sending them a copy of this Order.

Dated New York, October 1, 1930.

JERRY B. SULLIVAN,
Acting Chairman, Division One of said Court.

Notice of Motion to Dismiss Protest 92852-G.

UNITED STATES CUSTOMS COURT.

NORWEGIAN NITROGEN PRODUCTS CO., *Plaintiff*,

v.

THE UNITED STATES, *Defendant.*

Please take notice that upon the protest and the record heretofore made in the above entitled case, the undersigned, Charles D. Lawrence, Assistant Attorney General, attorney for the defendant, will appear before the United States Customs Court, First Division, at Washington, D. C., on October 29, 1930, at 10:30 A. M., or as soon thereafter as counsel can be heard, and move to dismiss the protest herein upon the ground that:

(1) A justiciable question is not presented herein upon which the judicial power of this court can act;

(2) The acts of the President, as Chief Executive of the United States, in issuing proclamation under and by virtue of the provisions of Section 315, Tariff Act of 1922, are not subject to judicial review;

(3) There is no provision of law conferring jurisdiction upon this court to review the acts of the United States Tariff Commission in connection with the merchandise involved herein;

(4) That the protest is insufficient for the reason that no provision of law has been pleaded or referred to, nor was the mind of the Collector directed to any provision of law, under which relief might be granted, as required by the rules of pleading applicable in customs cases, as enunciated by this court and the United States Court of Customs and Patent Appeals; and for such other and further relief as the Court may deem just in the premises.

Yours truly, etc.,

CHARLES D. LAWRENCE,
Assistant Attorney General.

UNITED STATES CUSTOMS COURT.

Protest 92852-G.

NORWEGIAN NITROGEN PRODUCTS CO., *Plaintiff*,

v.

THE UNITED STATES, *Defendant*.

Motion.

The United States, defendant herein, by its attorney, Charles D. Lawrence, Assistant Attorney General, upon the protest and the record heretofore made and all the papers in this case, hereby moves this Court for an order dismissing the protest herein and for such other and further relief as the Court may deem just in the premises.

The grounds upon which this motion is predicated and upon which defendant relies in support of the same are as follows:

(1) A justiciable question is not presented herein upon which the judicial power of this court can act;

(2) That the acts of the President, as Chief Executive of the United States, in issuing proclamation under and by virtue of the provisions of Section 315, Tariff Act of 1922, are not subject to judicial review;

(3) That there is no provision of law conferring jurisdiction upon this court to review the acts of the United States Tariff Commission in connection with the merchandise involved herein;

(4) That the protest is insufficient for the reason that no provision of law has been pleaded or referred to, nor was the mind of the Collector directed to any provision of law, under which relief might be granted, as required by the rules of pleading applicable in customs cases as enunciated by this court and the United States Court of Customs and Patent Appeals.

Respectfully submitted,

CHARLES D. LAWRENCE,
Assistant Attorney General.

JAMES R. RYAN,
Special Attorney, of Counsel.

Indorsed: Received Oct. 6, 1930, U. S. Customs Court. J. W. Dale, Clerk. W. H. T.

Notice of Appearance.

UNITED STATES CUSTOMS COURT.

Protests 92852-G, 128620-G, etc.

NORWEGIAN NITROGEN PRODUCTS CO., *Plaintiff*,

vs.

THE UNITED STATES, *Defendant*.

Sodium Nitrite.

We hereby enter our appearance as attorneys for the plaintiff in the above-entitled cause, transferred for hearing at Washington, D. C., on November 24, 1930, and request that we be given copies of all Orders and Notices concerning the same.

DE VRIES, CRAWFORD & McCOOK,
By MARION DE VRIES,
Attorneys for Plaintiff,
723 *Southern Building, Washington, D. C.*

Indorsed: Received Oct. 28, 1930, U. S. Customs Court. J. W. Dale, Clerk.

Stipulation.

UNITED STATES CUSTOMS COURT.

Protests 92852-G, 128620-G, etc.

NORWEGIAN NITROGEN PRODUCTS CO., *Plaintiff*,

vs.

THE UNITED STATES, *Defendant*.

Sodium Nitrite.

It is hereby stipulated and agreed by and between De Vries, Crawford & McCook, attorneys for plaintiff, and

Charles D. Lawrence, Assistant Attorney General, for and on behalf of the United States, defendant, subject to the approval of the Court, that the above-entitled cause, which, in so far as it relates to Protest 92852-G, was by Order of the Chief Justice, dated November 20, 1928, transferred to Washington, D. C., for trial, and by Order of Associate Justice Sullivan, Acting Chairman, Division One, dated October 1, 1930, was set for hearing at Washington, D. C., on October 29, 1930, at 10:30 A. M., shall now go over for hearing at the same place and hour on the 24th day of November, 1930; and that Protest 128620-G, involving the same class of merchandise and the same questions of law and fact, but which is more specific in its claims, be also transferred to Washington, D. C., for trial and set for hearing along with and at the same time as Protest 92852-G, the subject of the above-mentioned Orders.

It is further stipulated by the subscribing parties hereto that Protest 128620-G, if so transferred and set for hearing as hereinbefore stipulated, shall be subject in all respects to the Assistant Attorney General's Motion to Dismiss Protest 92852-G, of which Notice has heretofore been given, and to each and every ground set forth in said Notice as a basis for such Motion, in the same manner and to the same effect as if specifically included therein.

DE VRIES, CRAWFORD & MCCOOK,
By MARION DE VRIES,
Attorneys for Plaintiff,
723 *Southern Building, Washington, D. C.*
CHARLES D. LAWRENCE,
Assistant Attorney General,
Attorney for Defendant.

Approved.
JERRY B. SULLIVAN.

Indorsed: Received Port of Wash., D. C., Nov. 24, 1930, U. S. Customs Court. J. W. Dale, Clerk, by S. C. H., Reporter.

Proceedings Before the Customs Court.

U. S. CUSTOMS COURT, FIRST DIVISION.

Protests Nos. 92852-G and 128620-G.

NORWEGIAN NITROGEN PRODUCTS CO., *Plaintiff*,

vs.

THE UNITED STATES, *Defendant*.

WASHINGTON, D. C., November 24, 1930.

Before:

Judge McCLELLAND, presiding.
Judge SULLIVAN.
Judge BROWN.

Appearances:

De Vries, Crawford & McCook, Esquires, attorneys for the plaintiff, by Marion De Vries, Esquire, of counsel.

Charles D. Lawrence, Esquire, Assistant Attorney General, Customs Division, for the defendant, and James R. Ryan, Esquire, special attorney, associate counsel.

Judge McClelland: It is the view of the majority of the Court that the question, being of very great importance, and being raised for the first time before this Court, that we should take the motion under consideration, and defer action on it, but in the meantime to proceed to hear such testimony as the parties may desire to offer. Decision on the motion will be reserved.

Judge Brown: I wish to dissent from that order, because I think, in the first place, we ought to decide whether we have jurisdiction before we take any testimony.

* * * * * * *

Mr. Lawrence: If the Court please, I hope you will grant an exception to the Government, to your ruling

directing the taking of testimony on the merits. We feel, of course, that the jurisdictional question should first be determined.

Judge McClelland: The Government may have an exception to the ruling.

Mr. De Vries: I will call Mr. Morgan, the Secretary of the Tariff Commission.

Mr. Lawrence: Mr. Ryan will conduct the examination on behalf of the Government

SIDNEY MORGAN called as a witness on behalf of the plaintiff, having been duly sworn, testified as follows:

Direct examination by Mr. De Vries:

Q. Will you state your full name? A. Sidney Morgan.

Q. And your official position? A. Secretary of the United States Tariff Commission.

Q. As such have you custody of the records? A. I have, sir.

Q. I have asked you to produce certain records, by *subpœna duces tecum,* here this morning. Have you produced them? A. I have, sir.

Q. I invite your attention first to the Executive Order of the President of the United States, dated October 7, 1922, directed to the United States Tariff Commission. Have you that order A. I have that document.

Mr. De Vries: We offer it in evidence.

Mr. Ryan: I object to the document. I admit its authenticity. It is immaterial and irrelevant to the issues herein.

Mr. De Vries: I assume that the Court will take judicial notice of an order of the President.

Mr. Ryan: Yes, I think it can. I object to it upon the ground that it is immaterial and irrelevant.

Judge Brown: Do we not take judicial notice of that?

Mr. De Vries: I think you do.

Judge Brown: Then it is not necessary to put it in the record.

Mr. De Vries: I suppose the Court wants all of these matters before it, and I am offering it in this record in order that the record will be complete.

Judge McClelland: Inasmuch as the Court has held that we ought to take judicial notice of it, it can be admitted. The objection is overruled.

Mr. Ryan: Exception.

By Mr. De Vries:

Q. Have you made a copy of that order, Mr. Morgan? A. That is the copy which was transmitted with the President's letter, of the order.

(A photostatic copy of the document was received in evidence and marked Exhibit 1, protest 92852-G, etc., of this date.)

By Mr. De Vries:

Q. Mr. Morgan, have you with you, as a record of the United States Tariff Commission, the rules adopted by the Commission, October 26, 1922? A. I have a copy of those rules (producing paper).

Mr. De Vries: I am not so sure, your Honors, that the Court will take judicial notice of the rules and regulations of the Tariff Commission, though I assume that it will.

Mr. Ryan: May it please the Court, the Government admits the authenticity of whatever it purports to be, of the paper, but objects to its admissibility on the ground that this Court is without jurisdiction in the premises, and that no evidence is admissible; and upon the further ground that the so-called Executive Order is immaterial and irrelevant to the issues herein, and it has no bearing upon them whatsoever; therefore it is inadmissible.

Judge McClelland: You are addressing yourself now to the rule?

Mr. Ryan: That is the rule. Your Honors are not bound by those rules, and it is immaterial.

Mr. De Vries: The Executive Order directed the United States Tariff Commission to proceed in accordance with the law, in accordance with the rules and regulations which it had promulgated. These are the rules and regulations which the Commission had promulgated.

Mr. Ryan: May it please the Court, I think Judge De Vries is losing sight of the fact that however the Tariff Commission might have proceeded, is a condition precedent, and that the President's proclamation stands.

Judge Sullivan: Ought we not to have one or two ultimate facts upon which our conclusion may be based, that the Court has or has not power. It seems to me that the admission of the rules does not in any way affect our ultimate judgment as to what may be the right or wrong in this case. I am in favor of the admission of the rules.

Mr. Ryan: I doubt very much, if your Honors please, that the Court has jurisdiction to admit anything.

Judge McClelland: The admission of the rules will not have any bearing on what the Tariff Commission did.

Mr. De Vries: No; but it is a law binding upon the Tariff Commission, as to how it shall proceed, and I assume that your Honors, in New York, have not that before you. Therefore, we need it in the record, so as to have it before you.

Judge McClelland: The objection is overruled.

Judge Brown: Record my dissent, for the reasons already stated.

Mr. Ryan: Exception.

Mr. De Vries: It is stipulated that a copy may be filed.

Mr. Ryan: No objection to that.

(The same was received in evidence and marked Exhibit 2, Protest 92852-G, etc., of this date.)

Sidney Morgan.

By Mr. De Vries:

Q. Mr. Morgan, as Secretary of the Tariff Commission, have you in your custody, and have you produced in court, in response to a subpœna, the application, or brief, of the American Nitrogen Products Company, of Seattle, for an increase of duty upon sodium nitrite, filed with the Commission on October 24, 1922? A. Yes, sir.

Q. Was such petition filed? A. It was.

Mr. De Vries: I will explain at this point, your Honors, that this is the petition which initiated this proceeding before the Tariff Commission, and I am only seeking to put in this record the fact that it was filed, because it is one of the documents which the Tariff Commission refused to show us, upon our appearance as interested parties.

Mr. Ryan: May it please the Court, we respectfully object to the receiving in evidence of the so-called petition of the American Nitrogen Products Company; first, upon the ground that your Honors are without jurisdiction in the premises; second, upon the ground that it has no bearing whatsoever upon the issues herein.

We differ with Judge De Vries that it initiated the proceeding before the Tariff Commission; and lastly, and most important, upon the ground that it is a confidential document showing confidential trade secrets, that, under the provisions of Section 708 of the Act of September 8, 1916, which is cited in 39 Stat., 798, U. S. C. Title 19, Section 105, page 530, cannot be given out.

Mr. De Vries: I am not asking that this petition be introduced in evidence. I am asking that the witness testify at the present time that there was such a petition filed, and nothing more.

Judge McClelland: It has not been offered.

Mr. De Vries: I am not going to try to put in evidence in this Court that which the Tariff Commission has withheld as confidential.

Judge Brown: Suppose there had been no petition filed, could not the proceedings have gone on just the same?

Mr. De Vries: I believe so, under the law.

Judge Brown: Do you think it is a pleading?

Mr. De Vries: That is an important legal question that would take some hours to discuss. I have always held that the Tariff Commission could not, of it own accord, proceed until the present act.

Judge Brown: You think it is like a pleading in a lawsuit?

Mr. De Vries: It is more or less so.

Judge McClelland: All you are doing now is seeking to show that such a petition was filed?

Mr. De Vries: Yes; and that we demanded a copy of it, and that demand was refused.

Judge Sullivan: What is wrong with filing the petition?

Mr. Ryan: We admit that the petition was filed, but we contend that it has no bearing on the case; we contend that it is immaterial.

Judge McClelland: You were proceeding to argue that it contains business secrets that ought not to be exposed.

Mr. Ryan: Judge De Vries has now changed his offer.

Mr. De Vries: No, I have not changed my offer. That is what I said in the first place.

By Mr. De Vries:

Q. Were there any supplementary petitions, amendatory thereof, filed with the Commission.

Mr. Ryan: I object to that as immaterial.

Mr. De Vries: I will explain this, your Honors; that the statements in these petitions, the original and the supplementary, were subsequently demanded by the Norwegian Nitrogen Products Company, the right to inspect them, and it was denied by the Tariff Commission. So, all we are trying to show here is that there was an amendatory petition filed, which, subsequently, we were denied the right to inspect.

Judge Sullivan: An answer to your question, by the witness, of yes, would be all you ask?

Mr. De Vries: That is all I ask.

Judge McClelland: You have it.

Mr. John F. Bethune, former secretary of the Tariff Commission (interposing): We have not been able to find since a day or two ago, when you requested us to look up these papers, any supplementary application.

Mr. De Vries: Nor briefs, Mr. Bethune?

Mr. Bethune: No paper similar to this paper.

By Mr. De Vries:

Q. As Secretary of the Tariff Commission, Mr. Morgan, and custodian of its records, have you with you an order of investigation of the foregoing petition, or petitions, adopted by the Commission on or about March 27, 1923? A. I have with me the file copy of the order for investigation, No. 7, effective the 27th day of March, 1923.

Q. Have you a copy of it? A. I have not a copy. I can furnish a certified copy for the record.

Mr. De Vries: We offer that in evidence.

Mr. Ryan: I object, upon the ground that your Honors are without jurisdiction in the premises, and upon the further ground that the order is immaterial.

Mr. De Vries: That order recites an investigation of this particular petition, which is necessarily jurisdictional to the subsequent hearing.

Judge Brown: That would tend to show that they had made an investigation, would it not?

Mr. De Vries: No. It shows that they were proceeding to make an investigation, Judge Brown.

Judge Brown: I am not indicating my dissent to the rulings on each question, because I thought I had particularly indicated in the beginning that it covered all of this line.

Mr. De Vries: What is the ruling of the Court?

Judge McClelland: What is this? An order directing an investigation?

Mr. De Vries: This is an order by the Tariff Commission, that the Commission would proceed to investigate this petition.

Judge McClelland: The Court is somewhat in doubt about just how far we ought to go. We will leave this subject to further consideration. Final decision is reserved.

Mr. Ryan: Exception.

(The same was received in evidence and marked Exhibit 3, Protest 92852-G, etc., of this date.)

By Mr. De Vries:

Q. Mr. Morgan, have you with you a notice of public hearing of the foregoing petition, or petitions, which was adopted by the Commission on July 20,, 1923, and published, giving notice to all interested parties to appear, and that when they appeared they would be afforded the right to be present, to produce evidence, and to be heard? A. I have with me the Commission's docket, file copy of the public notice of a hearing ordered by the Tariff Commission, in Investigation No. 7, on sodium nitrite, published on the 20th day of July, 1923.

Mr. De Vries: I offer in evidence a copy of the same.

Judge McClelland: The Court will receive this paper on the same conditions as the other (marked Exhibit 3). The Court is not prepared at this time to decide that it has jurisdiction to review the action of the Tariff Commission; and no final ruling of admission will be made at this time. If you desire to continue to offer these papers, the opinion of the Court will be reserved until we have time to look into this very important question.

Mr. Ryan: Counsel for the Government objects, solely upon the ground that the Court is without jurisdiction to receive any evidence—for lack of jurisdiction.

(The paper referred to was marked Exhibit 4, Protest 92852-G, etc., of this date.)

Sidney Morgan.

By Mr. De Vries:

Q. As Secretary of the Tariff Commission have you in your custody, and have you produced in court, the testimony taken in response to the notice of public hearing, at the time fixed by the Commission? A. I have, sir.

Mr. De Vries: We offer in evidence the testimony taken at that hearing.

Judge McClelland: In harmony with the last statement made by the Court, the ruling on the question of the admissibility of this testimony taken before the Tariff Commission, will be reserved.

Mr. Ryan: I wish to formulate an objection, not only upon the ground that the Court is without jurisdiction in the premises, as the question is non-justiciable, but on the further ground that if the Court possessed jurisdiction in the premises, that a record made before a mere investigating body is not proper evidence under the ordinary rules of evidence. It is not admissible on any ground.

Judge McClelland: The vital question is whether we have the power to review the proceedings of the Tariff Commission.

Mr. De Vries: If so, all of those proceedings should be before the Court, in justice to the Court. I have here copies of the official records.

Mr. Ryan: That matter has been disposed of.

Judge McClelland: The copies of the testimony before the Tariff Commission may be received instead of the original.

Mr. Ryan: I wish the record to show that the so-called documents are merely a stenographer's transcript of certain proceedings, or a portion of the hearing, and they do not constitute a record of the Commission.

Judge McClelland: They are offered for what they are.

Mr. De Vries: I can subpœna the stenographer who took these minutes, and I suppose, strictly speaking, that would be the proper evidence in the case.

Mr. Ryan: It is only a transcript, and it represents only a portion of what actually transpired.

Judge McClelland: The Secretary of the Tariff Commission has produced what he calls the original. I assume that what he calls the original copies were relied upon by the Commission.

Mr. Ryan: We are admitting the authenticity of the copies, but Judge De Vries has offered them as the transcript of the testimony before the hearing. It is only at best a very partial transcript. You are losing sight of my objection to it. There is a wide distinction between a stenographic transcript of a certain proceeding, or certain testimony which was taken, and the record of a proceeding before the Commission; and Judge De Vries has offered them as the records of a hearing on that particular day.

Mr. De Vries: A part of the record, in so far as it goes.

Judge Brown: You do not claim that the testimony taken at the hearing covers all the proceedings in the investigation, do you?

Mr. De Vries: No.

Judge McClelland: What do you say to that, Mr. Ryan?

Mr. Ryan: That is what I have been trying to get him to say for the last ten minutes.

Mr. De Vries: That is all I said.

Judge McClelland: It will be received.

(The same was received in evidence and marked Exhibits 5, 6, and 7, Protest 92852-G, etc., of this date.)

By Mr. De Vries:

Q. Mr. Morgan, it appears from the testimony taken on September 10, 1924, which has just been introduced in evidence, that at the opening of the hearings at that time demand was made of the United States Tariff Commission, that it supply the Norwegian Nitrogen Products Company, an interested party therein, opposing said petition, a copy of the petition which had been filed with the Commission by the American Nitrogen Products Company.

Have you a copy of the answer of the Commission to that request?

Mr. Ryan: I object, upon the ground that the Court is without jurisdiction in the premises, and upon the further ground that the testimony of this witness, that would tend to vary, or explain, or supplement whatever is before the Court, is inadmissible.

Judge McClelland: The question is whether he has it. He may answer Yes or No.

Mr. Ryan: I object to that. I think it is immaterial.

Judge McClelland: The objection is overruled.

Mr. Ryan: I note an exception.

A. I have a deleted copy of the application.

By Mr. De Vries:

Q. Have you the letter transmitting it to me, or to anybody in the case? A. I have a copy of a letter to De Vries & Doherty, transmitting a summary of information compiled by the Tariff Commission in connection with the pending investigation.

Q. That is not it. A. I have been reading from the wrong exhibit. The answer to the question is, we could find no copy of such letter transmitting——

Q. Have you a copy of the deleted petition, which was furnished upon application, in your files? A. We have a copy of the deleted application. Whether we furnished it to Mr. De Vries I do not know.

Q. You have no letter of De Vries & Doherty, dated September 11, 1923, requesting that we be supplied a copy of that petition? A. I do have a copy of a letter from De Vries & Doherty, dated September 11th, 1923, requesting the information just described.

Q. But you have no copy of your letter transmitting it, or of any letter of the Commission transmitting it? A. We have a copy of no letter transmitting the deleted application.

Mr. De Vries: In order to keep the record, in order, if your Honors please, to introduce these things in

their logical sequence, I would like to be sworn temporarily.

Mr. Ryan: We will accept Judge De Vries's statement, as a member of the bar of this court, we will submit——

Mr. De Vries: May I offer in evidence the deleted copy, which was received by De Vries & Doherty, in response to that demand?

Mr. Ryan: I will admit that it was received, but object upon the same grounds as heretofore, and on the further ground that it is immaterial to the case. It is an attempt to try to reopen a matter which is *res adjudicata.*

Mr. De Vries: This goes right to the gist of the matter. Being a so-called defendant in the Court I appeared before the Commission and asked, in pursuance of a public notice, a right to appear, and demanded a copy of the petition and complaint that had been filed, so to speak, against our client. That was refused, and a deleted copy thereof was furnished. This is the deleted copy which was furnished us.

That is one of the important points in this case.

Mr. Ryan: We do not concede, nor can we see that he was a litigant before the Tariff Commission, nor was he a party. He was merely there as many others were, or could have been, to inform the Commission, and to state and hear their views.

Judge McClelland: Were not they permitted to participate in the hearing?

Mr. Ryan: They did, but not as a party. There is no party before the Tariff Commission.

Mr. De Vries: We were an interested party, appearing in response to the public notice of the Commission, entitled under the law to be heard.

Judge McClelland: It seems as though they were properly before the Commission, but the question of the admissibility of the paper will be reserved.

Mr. Ryan: We do not agree with Judge De Vries's statement that his clients were a party in interest before that Commission. They were participants, but the hearing was in the public interest, to which the

public was invited, and he was only a part of the public.

Judge McClelland: I presume under the notice it was proper for any citizen to be present?

Mr. Ryan: That is true.

Judge McClelland: If he had anything to say he could say it.

Mr. Ryan: That is true. He was there in the capacity of a citizen, and so was his client.

(The paper referred to was received in evidence and marked Exhibit 8, Protest 92852-G, etc., of this date.)

By Mr. De Vries:

Q. Mr. Morgan, the testimony which has been received in evidence conditionally shows that at that time I demanded a summary of the information before the United States Tariff Commission, in order that I might be heard thereupon. I will show you a letter of the Secretary of the Commission, dated September 15, 1923, and ask you if you recognize that signature? A. I do. That is the original of a copy which we have in our official files.

Mr. De Vries: I offer that in evidence.

Mr. Ryan: I make the same objection, if the Court please.

Judge McClelland: The same ruling.

Mr. Ryan: Exception.

(The same was received in evidence and marked Exhibit 9, Protest 92852-G, etc., of this date.)

By Mr. De Vries:

Q. I show you a letter dated September 24, 1923, signed by Thomas O. Marvin, Chairman of the Commission, transmitting to De Vries & Doherty, in compliance with a request for certain rulings and information by the Commission, certain information; do you recognize the signature of the Chairman of the Commission?

Sidney Morgan.

Mr. Ryan: We admit that is Chairman Marvin's signature.

A. While I am not personally familiar with the signature of Chairman Marvin, I identify it as one issued by the Tariff Commission.

Mr. De Vries: We offer that in evidence.

Mr. Ryan: I make the same objection to the letter, though admitting the authenticity of the signature.

By Mr. De Vries:

Q. Have you in your files a letter from De Vries & Doherty, dated September 11, 1923, making a demand for certain information from the Tariff Commission, to which said letter of the Chairman of the Tariff Commission, Chairman Marvin, was an answer? A. I have in my possession, as a part of the official records of the Tariff Commission, a copy of your letter of September 11th, just referred to.

Mr. De Vries: I offer in evidence a copy of our letter, and the answer of the Tariff Commission thereto.

Mr. Ryan: I make the same objection, though admitting the authenticity.

Judge McClelland: The same ruling.

Mr. Ryan: I note an exception.

(The two papers just referred to were received in evidence and marked Exhibits 10 and 11, protest 92852-G, etc., of this date.)

By Mr. De Vries:

Q. Mr. Morgan, the testimony shows that at the hearing of September 26, 1923, before the United States Tariff Commission, De Vries & Doherty made a demand for certain rulings of the United States Tariff Commission, as to what records and documents they should have a right to inspect. I show you a letter, dated October 2, 1923, signed by Mr. Bethune, Secretary of the Tariff Commission, transmit-

ting to De Vries & Doherty a transcript of the minutes of the commission, which consisted of rulings made by the commission in response to that request, made by myself and for De Vries & Doherty. Do you identify that? A. I identify that as a part of the official correspondence of the Commission.

Mr. De Vries: We offer that in evidence.
Mr. Ryan: The same objection.
Judge McClelland: The same ruling.
Mr. Ryan: Exception.

(The same was received in evidence and marked Exhibit 12, protest 92852-G, etc., of this date.)

By Mr. De Vries:

Q. Mr. Morgan, have you, as Secretary of the Tariff Commission, in your possession, and have you produced it here in Court, in response to a subpœna, a letter of Marion De Vries, or from De Vries & Doherty, dated April 19, 1924, a copy of a letter which was addressed to the President of the United States, which was transmitted by letter to Chairman Marvin, of the United States Tariff Commission? A. I have such a letter with me (producing paper).

Q. Is there with it a copy of my letter? A. There is.

Q. Addressed to Mr. Marvin? A. Addressed to Mr. Marvin.

Mr. De Vries: I offer that letter in evidence.
Mr. Ryan: I make the same objection as before.
Judge McClelland: The same ruling.
Mr. Ryan: Exception.

(The same was received in evidence and marked Exhibit 13, protest 92852-G, etc., of this date.)

By Mr. De Vries:

Q. Mr. Morgan, have you in your files an acknowledgment of that letter, by the Chairman of the Tariff Commission? A. We could not find any such copy.

Mr. De Vries: That is all. May it please the Court, I produce a copy of a letter, dated March 24, 1924, addressed to the President, signed by De Vries & Doherty, upon the subject matter of the issuance of any proclamation upon this finding of the Tariff Commission, and the acknowledgment thereof by C. Bascom Slemp, Secretary of the President. I offer the same in evidence.

Mr. Ryan: We make the same objection.

Judge McClelland: The same ruling.

Mr. Ryan: Exception, please.

(The two papers referred to were received in evidence and marked Exhibits 14 and 15, protest 92852-G, etc., of this date.)

Mr. De Vries: I hold in my hand an official document, entitled, "United States Tariff Commission, Washington. Sodium Nitrite. Report of the United States Tariff Commission to the President of the United States. Differences in costs of production of sodium nitrite in the United States and competing foreign country, as ascertained pursuant to the provisions of Section 315 of Title III of the Tariff Act of 1922, with Appendix, Proclamation by the President; (dated) Washington, Government Printing Office, 1924."

I desire to offer the first page thereof, down to the words "Rates of duty," and the proclamation of the President therein contained, pages 21 and 22, in refreshment of the minds of the Court.

Mr. Ryan: I object, upon the ground that the Court can take judicial notice of the proclamation, and that upon the first page will have no bearing whatsoever on the issue.

Judge McClelland: The same ruling.

Mr. Ryan: Exception.

(The same was received in evidence and marked Exhibit 16, protest 92852-G, etc., of this date.)

Mr. De Vries: The plaintiff rests.

Mr. Ryan: The Government moves to strike out all the offers of documents, and all the evidence in this

proceeding, upon the ground that the Court is without jurisdiction in the premises, and therefore has not the power to receive any evidence whatsoever; and upon the further ground that, assuming, without conceding, its jurisdiction, which we deny, that the documents are inadmissible, as they tend to vary, or to impeach, or to explain a Presidential Proclamation, which is a better record of an official action required by law, and to which proclamation the law imputes absolute verity.

Judge McClelland: Decision on the motion will be reserved.

Mr. Ryan: May the Government have an exception in case your Honors rule against us?

Judge McClelland: You may have an exception.

Mr. Ryan: The Government rests.

Judge McClelland: Do you wish time for arguments or briefs?

Mr. De Vries: I would like to have 30 days after the testimony is transcribed, in which to file a brief.

Judge McClelland: You may have 30 days after the transcription of the testimony.

Mr. Ryan: The Government already has its brief in. The Government requests 15 days after the filing of the plaintiff's brief, in which to file any reply brief we may find necessary.

Judge McClelland: I will grant the Government 15 days' additional for a reply brief, if desired.

Decision of the Customs Court.

U. S. CUSTOMS COURT, FIRST DIVISION.

(T. D. 44824.)

Protests 92852-G/11125 and 128620-G/50885 Against the Decision of the Collector of Customs at the Port of New York.

NORWEGIAN NITROGEN PRODUCTS CO.

v.

UNITED STATES.

(Decided April 21, 1931.)

SULLIVAN, *Judge:*

The merchandise involved in these protests is described by the appraiser as "sodium nitrite."

On September 21, 1922, Congress enacted a tariff act under which this merchandise was classified and in paragraph 83 thereof provided a duty thereon of 3 cents per pound.

Afterwards, and under date of May 22, 1924, by Presidential proclamation under section 315 (*a*), Tariff Act of 1922, the duty on sodium nitrite was increased to 4½ cents per pound. T. D. 40204, 45 Treas. Dec. 642.

The collector therefore assessed the merchandise in question at 4½ cents per pound under paragraph 83 in accordance with the President's proclamation.

The plaintiff contests the validity of this assessment, claiming the merchandise is dutiable at only 3 cents per pound under paragraph 83.

The reasons therefor are stated in Protest 128620-G in a more extended pleading than in Protest 92852-G. It is alleged that the increased rate of duty was based on a Presidential proclamation, the basis for which was the report of the Tariff Commission, and that the plaintiff was not afforded an opportunity to cross-examine witnesses, nor to inspect testimony taken by the Commission; that by reason thereof the acts of the Tariff Commission were and

are without authority of law and therefore null and void; that the investigation of the subject matter by the commission was contrary to law and the regulations promulgated by the President and thereby insufficient to aid the President in the conclusion expressed in the proclamation.

Protest 128620-G further alleges that in addition the President, as required by section 315 of the Tariff Act of 1922, did not himself make an investigation into the conditions of the cost of production of nitrite, nor, in fact, make any investigation; and that the increase in rate from 3 cents to 4½ cents per pound was not made in accordance with law and is therefore invalid and void.

It is further alleged that, under section 315, the method by which the rate of duty on nitrite of sodium was increased by the President was unconstitutional and void "by reason of the fact that therein and thereby the Congress of the United States has endeavored to delegate to the President of the United States the constitutional power to levy and collect a tax, contrary to the terms and provisions of Article VIII, section 1, subdivision 1, of the Constitution of the United States."

It is therefore claimed the correct rate of duty is 3 cents per pound under paragraph 83 of the Act of 1922.

At the opening of the trial the Government moved to dismiss the protests, alleging in substance (1) that a justiciable question was not presented; (2) that the acts of the President in issuing proclamation under and by virtue of the provisions of section 315, Tariff Act of 1922, are not subject to judicial review; (3) that there is not any provision of law conferring jurisdiction on this court to review the acts of the United States Tariff Commission in connection with the merchandise involved herein; (4) that the protest is insufficient for the reason that there is not any provision of law pleaded or referred to, nor was the mind of the collector directed to any provision of law under which relief might be granted, as required by the rules of pleading applicable to customs cases.

This motion was held in abeyance by the court. Testimony was offered subject to the objection of the Government that it was incompetent, immaterial, and irrelevant to any issue in this case. The testimony was taken subject to such objection.

First. The issue involved in this case may be stated as follows:

(*a*) Did the collector assess this merchandise in accordance with the law in force at the time of such assessment?

(*b*) May the court review the proclamation of the President of the United States expressed in T. D. 40204, *supra*, and ascertain upon what facts the President based his conclusion?

The proclamation may be summarized as follows:

That the United States Tariff Commission made an investigation to assist the President in ascertaining the differences in the cost of production of, and all other facts and conditions enumerated in section 315 with respect to sodium nitrite, specified in paragraph 83 of the Tariff Act of 1922; and that reasonable notice was given of said investigation and the hearing in respect thereto "at which parties interested were given a reasonable opportunity to be present, to produce evidence and to be heard"; that "the President, upon said investigation of said differences in cost of production of said article wholly or in part the growth or product of the United States and of the like or similar article wholly or in part the growth or product of competing foreign countries, has thereby found that the principal competing country is Norway and that the duty fixed in said title and act does not equalize the difference in costs of production in the United States and in said principal competing country, namely Norway, *and has ascertained and determined* the increased rate of duty necessary to equalize the same"; and "that the increase in the rate of duty shown by said ascertained differences in said costs of production necessary to equalize the same is as follows:

An increase in said duty on sodium nitrite from 3 cents per pound to 4½ cents per pound.

The proclamation (T. D. 40204, *supra*) is based on the provisions of section 315 (*a*) of the Tariff Act of 1922, which provides—

> That in order to regulate the foreign commerce of the United States and to put into force and effect the policy of the Congress by this Act intended, whenever

> the President, upon investigation of the differences in costs of production of articles wholly or in part the growth or product of the United States and of like or similar articles wholly or in part the growth or product of competing foreign countries, shall find it thereby shown that the duties fixed in this Act do not equalize the said differences in costs of production in the United States and the principal competing country he shall, by such investigation, ascertain said differences and determine and proclaim the changes in dassifications or increases or decreases in any rate of duty provided in this Act shown by said ascertained differences in such costs of production necessary to equalize the same. * * *: *Provided,* That the total increase or decrease of such rates of duty shall not exceed 50 per centum of the rates specified in Title I of this Act or in any amendatory Act.

The question presented by this record is whether or not the collector allowed the law in the assessment of duty on the merchandise involved. On that proposition the court has jurisdiction of the subject matter and the parties and therefore may determine whether or not the judgment of the collector was correct.

Jurisdiction and judicial power are not synonymous terms.

The provisions of this act have been declared constitutional. See Hampton *v.* United States, 276 U. S. 394.

While it is pleaded in the case at bar that the act is unconstitutional, yet we are relieved of investigating this contention by the following which occurred at the trial:

> *Judge Brown:* You claim here that the act is unconstitutional. * * * You have abandoned that claim?
>
> *Mr. De Vries* (Plaintiff's counsel): Surely. I would never have asserted it. As a matter of fact, I argued the other way. I drew the statute. Why would I assert that it was unconstitutional?

Second. Did the President's proclamation increasing the rate of duty on sodium nitrite become a verity to the extent that the facts upon which it is based and the con-

clusions arrived at can not be questioned in this proceeding?

The proclamation establishes the following facts:

(*a*) There was a hearing before the Tariff Commission in accordance with the provisions of section 315.

(*b*) All parties, including the plaintiff, were present at such hearing.

(*c*) The Commission made a report of its findings to the President.

(*d*) The President exercised his judgment on the facts, whether or not the existing rate of duty on sodium nitrite was sufficient to equalize the differences in cost of production in the United States and in Norway, and determined the increased rate of duty necessary to equalize such costs.

(*e*) In arriving at his conclusion he could consider other facts than those presented by the Commission.

(*f*) He proclaimed his conclusion increasing the rate from 3 to 4½ cents per pound.

It is evident that in arriving at such conclusion and proclaiming it he was merely executing an act of Congress. He was the mere agent of the lawmaking department to ascertain and declare an event upon which its expressed will was to take effect.

As shown by this case the act of the President in arriving at the conclusion he did can not be inquired into by this court.

It is evident from a reading of the statute that the President is not confined to an investigation by the Tariff Commission.

Plaintiff's counsel at the hearing admitted this, for it is stated at page 48 of the minutes:

> *Judge McClelland:* Is it your view that the President is limited to the report that he received from the Tariff Commission?
>
> *Mr. De Vries:* He is not, your Honor.

The fact that he may disregard the conclusion of the Tariff Commission further accentuates the proposition that an inquiry can not be made into the circumstances or facts upon which the proclamation is based.

The principal contention of the plaintiff is based on the proposition that he did not have such hearing before the Tariff Commission as provided by law; that the refusal by the Commission to permit plaintiff to see the testimony taken by the Commission, or more closely to cross-examine the witnesses, was such an abridgment of his rights as to render the report of the Commission futile.

While this contention is interesting it is not convincing. We are not interested in the procedure of the Commission. We are only interested in the fact that a hearing was had. What the President did is the vital fact. Did he follow the law? If so, all inquiry ends. It is the President's act that we are to consider, as he created the rate of duty upon which the collecter acted. It is then the question: Did the collector follow the law? It is from the collector's action that the plaintiff appeals, not from the procedure before an aid to the President.

The proclamation speaks the ultimate result of the conclusion of the President. The method pursued by a legislative body in the enactment of a statute can not be inquired into. The statute speaks the ultimate result attained by the legislature.

It logically follows that the statute and proclamation are immune from attack as to the methods by which the result was attained.

The President was not required to follow the findings of the commission. He may have used his independent judgment. He may have had other aids, such as personal investigation and commerce reports. In any event it was the President who found the difference. It was the President who proclaimed such findings. It was the President who acted and declared the law. It was the collector who assessed the duty, and it is the action of the collector that is at issue.

Third. Section 514 of the Tariff Act of 1922 specifies when and under what circumstances decisions of the collector may be contested, as follows:

> All decisions of the collector, including the legality of all orders and findings entering into the same, as to the rate and amount of duties chargeable, * * *

shall be final and conclusive upon all persons, unless the importer * * * shall * * * file a protest in writing * * *.

The only order applicable to the collector in this case is the proclamation of the President of the United States, for it entered into the rate of duty chargeable to the merchandise. The collector was not interested in what occurred before the Tariff Commission. He did not receive a single order or declaration therefrom pertaining to his duty. The collector received an order signed by the President of the United States declaring the proper rate of duty on sodium nitrite to be 4½ cents per pound. The collector could not question that order any more than this plaintiff. The collector did not have any connection with what took place before the Tariff Commission. He was not interested in the proceedings nor bound by any report they might make. The Commission did not report to the collector but to the President of the United States, and the President's action became as binding upon the collector as any part of the tariff law of the United States.

It therefore necessarily follows that, the law being constitutional, the proclamation became irrevocable and not subject to an attack for want of power or procedure in arriving at the conclusion stated therein.

A very interesting case on this subject is United States *v.* Chemical Foundation (Inc.), 272 U. S. 1. That was an action brought by the United States to set aside sales whereby patents, copyrights, etc., seized as enemy property, were transferred to the defendant by the Alien Property Custodian. It was alleged that the Government did not have power to make this transfer and that the proclamation of the President, directing it through his representative, Frank L. Polk, was void as being without authority on the President's part and that it was permissible to go behind the proclamation and ascertain the facts with reference thereto.

The law empowering the President to act is set forth in Section 12 of the Trading With the Enemy Act whereby enemy property was taken over by the Government of the United States.

It is not necessary to set forth the various paragraphs of that act. They are quoted in the cited cases. However,

we will quote the following proviso in the act as set out on page 9 of the opinion:

> *Provided,* That any property sold under this Act, except when sold to the United States, shall be sold only to American citizens, at public sale to the highest bidder, after public advertisement of time and place of sale which shall be where the property or a major portion thereof is situated, *unless the President* stating the reasons therefor, in the public interest *shall otherwise determine:* * * * [Italics ours.]

Here was authority given the President to make sale of property without advertisement or to others than the highest biddder.

It was provided that "the President may exercise any power or authority conferred by this act through such officer or officers as he shall direct." It appears Frank L. Polk was appointed with all the power conferred upon the President by the provisions of Section 12 of said act.

That the acts of the President were not legislative is clearly enunciated on page 12 of the Chemical Foundation case, *supra,* as follows:

> The determination of the terms of sales of enemy properties in the light of facts and conditions from time to time arising in the progress of war was not the making of a law; it was the application of the general rule laid down by the act. When the plenary power of Congress and the general rule so established are regarded, it is manifest that a limitation upon the excepted class is not a delegation of legislative power. Field *v.* Clark, 143 U. S. 649, 692; Buttfield *v.* Stranahan, 192 U. S. 470, 496; Union Bridge Co. *v.* United States, 204 U. S., 364, 377; United States *v.* Grimaud, 220 U. S. 506, 516.

The order empowering Frank L. Polk, as agent of the President, to make a sale, stated:

> I hereby vest in Frank L. Polk all power and authority conferred upon the President by the provisions of Section 12 * * *.

It was contended that such authority could not be delegated by the President to another, but the court stated:

> The contention that power to determine how enemy property should be sold could not be delegated to another is not sustained. This court has had occasion to consider a like question in Central Trust Co. *v.* Garvan, 254 U. S. 554, 567; Stoehr *v.* Wallace, *supra,* 244, and Commercial Trust Co. *v.* Miller, 262 U. S. 51, 53. These decisions sustain the delegation here involved.

In the case at bar there is not any attack upon the proclamation of the President of the United States increasing the rate. The attack seems to be on an independent body empowered by law to aid the President, that it did not permit the plaintiff to exercise certain rights during the hearing. We are not interested in that proposition, and this is not the tribunal wherein such contention can be advanced.

In the Chemical Foundation case, *supra,* with reference to the power of Frank L. Polk to act for the President and do the things designated, it is stated:

> And the validity of each of the orders made by Mr. Polk is attacked by the United States on the ground that it was too broad and constituted an attempt to give to the Custodian the very power granted to the President by the Act; that is, the power to determine that enemy properties should be disposed of otherwise than as specified in the proviso. But the contention can not prevail. Each of the orders sufficiently described the patents seized and authorized a private sale to the Foundation without advertisement. This was enough to indicate a determination to take these sales out of the class covered by the proviso. And it is insisted that the orders were induced by misrepresentation and were made without knowledge of the material facts. But both courts found that the United States failed to establish any conspiracy, fraud, or deception alleged.

How applicable is this statement to the case at bar. There is not a single allegation in the pleading or attempt to establish that any deception was used or any fraud to

induce the President to act as he did. We are not holding that if such facts were pleaded they would aid the plaintiff. We are not passing on that question. The fact remains that what came before the President was in the ordinary way, in the ordinary course, and his action was merely carrying out the law itself.

Under such conditions it is impossible to think for a moment that you may go behind this proclamation.

Fourth. There is some contention that the President is not immune from answering to the law for his acts, and therefore plaintiff may show that the President acted illegally and proclaimed what he was not empowered to do. This contention is unsound. In the first instance, the President, acting as he did, was not legislating. If he was his act is void. Congress alone may legislate. He did not have any discretion, except as to the rate. He did not create a law. He merely found a fact, viz, that there was a difference in the cost of production between the article produced in this, and the article produced in the competing country, and such difference instantly became the law of Congress without other act than proclaiming the fact. So that, in fact, at all times the law existed as now declared. It is therefore evident, if what the President did was in conformity to law, his act can not be impeached any more than an act of Congress. This theory is in consonance with the holding of the Court of Customs Appeals in the Hampton case and the Supreme Court of the United States in 276 U. S. 394. If he had acted beyond the law, that is, if he had increased the rate more than 50 per centum, then his act would have been void. It does not require any argument to sustain that proposition. The act would have been *ultra vires*. Therefore, the only question in causes of this nature is: Did the President act as the law empowered him? If so the controversy is ended. This rule is well stated in Clarke *v.* United States, 17 C. C. P. A. 420, T. D. 43866. There the question arose as to the right to contest a reliquidation ordered by the Secretary of the Treasury as to the value of the rupee, the currency of India, under the provisions of section 25 of the Tariff Act of 1894, continued in effect by the Tariff Act of 1913. That section provided that the value of standard coins in circulation in the various nations of the

world shall be estimated quarterly by the Director of the Mint and proclaimed by the Secretary of the Treasury. It then provided that the Secretary of the Treasury may order a reliquidation of any entry at a different value whenever satisfactory evidence shall be presented to him, showing that the value in United States currency of the foreign money of the invoice was at the date of certification at least ten per centum more than the proclaimed value. The court, in denying the right to go behind this order, held (pp. 422 and 423):

> Construing the language of the statute in the light of these several decisions, we conclude that authority for a judicial review of the findings of the Secretary and the action of the collector under such findings is limited to determining simply whether the order made is by its terms in conformity with the statute and whether the collector has correctly applied the law in making the reliquidation directed.
>
> * * * * * * *
>
> Giving to it the same construction which the Supreme Court gave to the language of the first portion of the section, it follows that if the finding of the Secretary, upon which the reliquidation is directed, shows upon its face that it conforms to the law, it is conclusive and binding and is likewise not subject to judicial inquiry as to its correctness, and if the collector's action conforms thereto it should be sustained.

It seems to us that the above authority—the latest expression on this question of our appellate court—being in harmony not only with authority but reason, precludes the plaintiff in the case at bar from going behind the return, namely, the proclamation of the President.

That the President's proclamation is sacred and can not be reviewed is further strengthened when we consider that his act was amplifying the law. There is not any allegation or attempt to prove that the rate provided is unreasonable; therefore, the rate can not be reviewed. As previously stated the President did not create a law; he merely declared an event upon which the law took effect.

This is well stated in the Hampton case, *supra*, where the Supreme Court said, citing Field *v.* Clark, 143 U. S. 649:

> * * * It was contended that this section delegated to the President both legislative and treaty-making powers and was unconstitutional. After an examination of all the authorities, the Court said that while Congress could not delegate legislative power to the President, this Act did not in any real sense invest the President with the power of legislation, because nothing involving the expediency or just operation of such legislation was left to the determination of the President; that the legislative power was exercised when Congress declared that the suspension should take effect upon a named contingency. What the President was required to do was merely in execution of the act of Congress. It was not the making of law. He was the mere agent of the law-making department to ascertain and declare the event upon which its expressed will was to take effect.

We can not enlarge on this holding of the Supreme Court of the United States. It satisfies the mind that what the President did was merely to give expression to an act of the legislative body upon the happening of an event, namely, that there was a difference in the cost of production of the merchandise in the United States and the competing country.

As the act was held constitutional it necessarily follows that the method pursued by the agent of the law-making department in arriving at the fact of the difference in question can not be reviewed by the court but becomes a verity upon its proclamation.

We need not further elaborate on this question.

The collector having followed the law in force at the time of the assessment of duty, his judgment must be affirmed.

The testimony offered by the plaintiff is not only immaterial but incompetent to any issue involved. The objection thereto made by the Government is sustained, the motion to strike it out is granted, and an exception given to the plaintiff.

The Government's motion to dismiss the protests is denied, and an exception granted to the Government. The protests are overruled, and the action of the collector affirmed as to each protest.

J. B. S., *J.*

CONCURRING OPINION.

McCLELLAND, *Judge:*

I concur in the conclusion of Judge Sullivan that the protest herein should be overruled and the collector's assessment of duty affirmed.

I look upon the issue raised by the protests as being comparatively easy of solution. Any question of the constitutionality of the so-called flexible tariff provision, as embodied in section 315 of the Tariff Act of 1922, is expressly abandoned by counsel for the plaintiff as appears by the following in the record:

> *Judge Brown:* You claim the act is unconstitutional. Do you stand on that claim?
>
> *Mr. De Vries:* That was something put in there——
>
> *Judge Brown:* You have abandoned that claim?
>
> *Mr. De Vries:* Surely. I would never have asserted it. As a matter of fact I argued the other way. I drew the statute. Why would I assert that it was unconstitutional?

My attention has been directed to a recent decision by the Third Division of this court (in which Judge Brown participated) in the case of Fox River Butter Co. *v.* United States, T. D. 44667, wherein it was held by a majority of that division that the delegation of power granted by the Congress in section 315, *supra,* was unconstitutional, notwithstanding that the issue raised by the protest was neither an attack on the language of section 315, *supra,* or the constitutional right of the Congress to delegate to the President the power under the conditions and in the manner therein provided to change existing rates of duty. The plaintiff in that case in its protest simply stated its grounds of objection to the collector's assessment of duty on certain cheese in the following words:

> Protest is hereby made against your decision as to the rate or amount of duties chargeable on Swiss cheese and your assessment thereof at 7½ cents per pound or 37½ per centum ad valorem and your liquidation of the entries below named. The reasons for the objection, under the "Tariff Act of 1922," are that said merchandise is dutiable at 5 cents per pound but not less than 25 per centum ad valorem under paragraph 710, or in the alternative when assessed at 37½ per centum ad valorem at 7½ cents per pound. We further claim that the President exceeded his powers in issuing his proclamation on Swiss cheese because he is limited by law to proclaiming an increase in rate which will equal the difference in cost of production, and that such difference can not be one or the other of two sums, whichever is higher.
>
> We further claim that under the law he could only increase the rate in the enacting clause and not in the proviso, or at the appropriate rate according to the component material of chief value, provided such rate is not greater than the rate assessed, or at 10 per centum or 20 per centum ad valorem under paragraph 1459.

So far, therefore, as the protest discloses there was no intent on the part of the protestant to raise the question of the constitutionality of section 315 or part of it. It is true that counsel for the protestant do in their brief state—

> That section 315 is a delegation of legislative power and therefore unconstitutional.

Even in that statement there is no indication that it was claimed that section 315 was unconstitutional because of anything that the President did, either preliminary to issuing his proclamation or because of anything he embodied in his proclamation.

The question as to the constitutionality of section 315, *supra*, I look upon as being *res adjudicata*. It was passed upon in Hampton *v.* United States by this division, a majority sustaining the law, and Judge Brown dissenting,

holding the law unconstitutional. T. D. 41478. In writing the prevailing opinion I said in the concluding paragraph:

> Congress in framing section 315 manifestly contemplated that there might develop greater differences between costs of production of commodities in foreign countries and the United States than existed at the time of the passage of the Tariff Act of 1922, and therefore delegated to the President the power to ascertain through investigation whether and to what extent such changes took place. The President in making such investigation and in determining the difference in such cost of production, as well as fixing a rate of duty which would equal such difference, was carrying out the expressed will of Congress, and was in no sense usurping the constitutional privileges of that body.

From that decision of this court an appeal was taken to the Court of Customs Appeals, where Judge Graham in the last paragraph of an elaborate opinion said:

> It is apparent, from the facts hereinbefore recited and the discussion had, that the single question presented for determination is, whether Congress, in attempting to grant to the President the power to increase the rates of duty specified in the statute by adding thereto the differences in cost of production ascertained by him under section 315 (*a*), acted within constitutional limits, or whether such act was, in that respect, null and void; and our decision is limited to that precise question. (Hampton, Jr., & Co. *v.* United States, 14 Ct. Cust. Appls. 350, 375.)

From such decision of the Court of Customs Appeals the case was carried by *certiorari* to the United States Supreme Court where, upon review the constitutionality of section 315, *supra,* was again upheld. Chief Justice Taft, in concluding the unanimous opinion of the court, said:

> And so here, the fact that Congress declares that one of its motives in fixing the rates of duty is so to fix them that they shall encourage the industries of this country in the competition with producers in other

> countries in the sale of goods in this country, can not invalidate a revenue act so framed. Section 315 *and its provisions* are within the power of Congress. The judgment of the Court of Customs Appeals is affirmed. [Italics mine.] (J. W. Hampton, Jr., & Co. *v.* United States, 276 U. S. 394, 413.)

It is notable that the Chief Justice did not say that section 315 was constitutional in part but instead said that *all its provisions* were within the power of Congress.

In my opinion it is a mighty stretch to hold that the law itself is unconstitutional simply on the assumption that the President erred in exercising the power delegated to him. Such error might invalidate the President's act, but such invalidation could not, in my view, be held to have any bearing on the constitutionality of the statute delegating to him the power to act.

I concur with the view expressed by Judge Sullivan that the testimony offered by the plaintiff is incompetent and immaterial as to any issue here involved in this case, and that therefore the objections thereto are sustained. I also concur in his view that the motion to dismiss the protest be denied with the benefit of an exception to the Government.

All of the questions raised by the protestant have been ruled against it by Judge Sullivan, and with such action I am in complete accord.

C. P. McC., *J.*

DISSENTING OPINION.

BROWN, *Judge:*

This suit against the United States was brought in this court under the legal remedy provided by the customs act by an importer of sodium nitrite. It was tried in Washington, D. C. The plaintiff asks for judgment of refund against the defendant for the amount covering the difference between 3 cents and 4½ cents a pound, said protests constituting a test case.

The plaintiff claims that the Presidential proclamation, T. D. 40204, 45 Treas. Dec. 642, increasing the duty on sodium nitrite from 3 cents a pound to 4½ cents per pound, at which the collector took duty, is *ultra vires,* null and

void, because no proper hearing was had under section 315 to authorize a proclamation; that the resulting higher tax is not legally levied, and consequently his goods were only subject to the statutory rate specifically provided for sodium nitrite, in paragraph 83 of the act of 1922, at 3 cents per pound. There is also a claim in the protest that section 315 is unconstitutional.

The conclusion of the proclamation reads:

> An increase in said duty on sodium nitrite from 3 cents per pound to 4½ cents per pound.

It does nothing except raise the *rate* of taxation upon all sodium nitrite thereafter imported.

The plaintiff's contentions are:

(1) Because he was only served with a deleted petition of the domestic manufacturer asking for the investigation;

(2) Because he was not allowed to fully cross-examine the president of one of the domestic companies who testified at the hearing;

(3) Because he was not allowed to cross-examine the field experts at the hearing, and for other similar reasons, all relating to the conduct of the hearing part of the investigation, that the resulting increased tax was levied and collected without legal authority.

The Government moves to dismiss on the ground that the case does not present a justiciable subject matter, which is practically a demurrer to the protest or complaint, and claims that consequently all evidence concerning the conduct of the hearing is inadmissible.

The hearing provision in section 315, act of 1922, upon which the plaintiff relies reads as follows:

> Investigations to assist the President in ascertaining differences in costs of production under this section shall be made by the United States Tariff Commission, and no proclamation shall be issued under this section until such investigation shall have been made. The commission shall give reasonable public notice of its hearings and shall give reasonable opportunity to parties interested to be present, to produce

> evidence, and to be heard. The commission is authorized to adopt such reasonable procedure, rules, and regulations as it may deem necessary.

The ancient legal rule against Executive legislation or Executive taxation was embodied in the Constitution as Article I, section 1:

> All legislative powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and a House of Representatives.

And Article I, section 8:

> The Congress shall have power to lay and collect taxes, duties, imposts and excises, etc.

The constitutional rule was that under these provisions the legislative taxing discretion—that is, the power to fix the amount of the future tax—could not be delegated to the Executive. That was illegal because it was discretionary and therefore legislative. Field *v.* Clark, 143 U. S. 649, held that *the fact* that a foreign country levied a discriminatory duty against our exports greater than against the exports of other countries could be proclaimed by the President to bring into effect a retaliatory rate of duty already fixed in amount by Congress. That was sustained because it did not involve discretion and was therefore not legislation by the Executive.

The flexible tariff involves discretion at every stage of the process. It was not sustained as a fact-finding process. It could not be. The subject matter is not an ascertainable fact. It is the expression of an opinion. The Hampton case, 276 U. S. 394, declared a new rule of delegation to the effect that the legislative taxing discretion could, for the first time, now be delegated, provided the policy and plan of the delegation were clearly and intelligently stated under a rule or formula which the delegee should obey.

The action then is legislative action not determining a legal right. Consequently the hearing must be a mere legislative hearing. In the view of the Hampton decision, when the President, acting for Congress, proclaims a new tax, under the formula, Congress, in theory, fixes the tax.

Consequently, when the Tariff Commission, acting for Congress, calls a hearing, that is a congressional hearing.

This court can not dictate the kind of legislative hearing Congress, acting through the Tariff Commission, chooses to hold or declare the resulting tax void by reason of the fact that this legislative hearing is not conducted as a judicial hearing before a court.

The truth, the reality to be faced, and neither evaded nor glossed over, is that the action concerning which a hearing is to be had here is legislative action which does not determine a legal right but perfects a political policy to keep the tariff rates conformed to supposed cost difference. The fact that if under the present legal rule, as expounded in the Hampton case, that may now legally be delegated to, and performed by, executive officers, does not change in the slightest either the nature of the act or the legal incidents of the act. It is doubtful if either legislatures or courts (quite outside of constitutional limitations) can change an inherently political, nonjusticiable, subject matter, which is legislative in kind, into a litigable subject matter, any more than they can change black into white. But there is absolutely no evidence of such intention in this statute or in the opinion of the Supreme Court in the Hampton case.

The Tariff Commission suggests to the President what new customs taxes to proclaim, just as the Finance and Ways and Means Committees suggest to the Congress what new taxes to levy. The legislative analogy is perfect. Neither is a fact-finding body. The difference in production costs is not an ascertainable fact but a matter of personal judgment, often similar to the verdict of a jury or to a mere theoretical allotment of the separate costs of joint products and by-products, which can not actually be separated into figures.

From the nature of the political subject matter here involved, determining the *amount* of a future tax rate; from the fact that the act of fixing a rate for the future is legislative; that it does not enforce a *legal right but carries out a political policy;* from the further fact that the language of the statutory provision itself seems to leave the commission to determine what kind of, and how much of, a hearing it shall have, it follows inevitably that, in pro-

viding for a hearing, Congress meant to establish a legislative rather than a judicial hearing.

At the oral argument at Washington, D. C., the distinguished counsel for the protestant argued as follows:

> I believe that upon the ultimate determination of what the words in section 315 mean depends the continuance of the delegation of the tax-levying power by the Congress into any commission or body; because by its ultimate interpretation of the wording that an interested party has a right to present evidence and to be heard, fixing the rights of interested parties to appear in such a proceeding and particularly to examine what has been collected by the Tariff Commission, in a reasonable way, on the subject, in order that thereupon they may be heard, is going to depend the view of the Congress upon this delegation of power. Upon the question of whether the tariff-making power of the Government is going to be exercised by star chamber proceedings in the presence of the statute, as those words are defined by the Supreme Court of the United States, must depend the view of the Congress of this delegation of power.

This is an intimation that he believes Congress would not have made the delegation in section 315 unless it supposed the courts could review the action of the Tariff Commission in the same sort of way the action of the Interstate Commerce Commission is judicially reviewed.

He argues, therefore, that the hearing provision of section 315 of this act must be construed as if it provided in so many words for a judicial hearing to be governed by the same legal rules as a litigation determining a legal right or obligation. This is exactly as if the domestic manufacturer, petitioning the Tariff Commission for an investigation, was a legal plaintiff; as if the parties interested—that is, affected by the proposed change in the statutory tax, including all the consumers of the article—were, if they cared to be, proper legal parties in the supposed case, plaintiffs and defendants in a legal action; as if the resulting finding of an increased or decreased tax to meet supposed cost difference to carry out the congressional policy was a legal judgment, not, of course, declar-

ing or enforcing a legal right, but legislating the amount of a future tax.

While the mere statement of this proposition and its necessary incidents is its own best answer, it may be well to pursue the inquiry further. Congress is presumed to know the law. Its members are presumed to, and undoubtedly did, know they were dealing with a tax, with the power to make or break, to conserve or destroy, to exclude or confiscate the trade in the articles affected, and not with a legal charge for services, necessarily reasonable, and neither arbitrary nor confiscatory. But they must have known that they did not change the nature of taxation by such delegation and that all taxation, including customs taxation, could be unreasonable, arbitrary, and trade-destroying and therefore was not subject to judicial review as are railroad charges for any of these reasons. Patton *v.* Brady, 184 U. S. at p. 608; Flint *v.* Stone (etc.), 220 U. S. at p. 167; McCray *v.* United States, 195 U. S. at p. 58.

They also must have known that they could not establish a judicial review of the discretionary action within the statute under the formula carrying out the political policy there expressed, which necessarily largely includes discretion over the conduct of the hearing here contested, without turning the reviewing courts, in whole or in part, into tax-levying bodies controlling the ultimate result. The Constitution forbids that, and so far as it remains it must be enforced, whether we happen to think we would be better off without it or not.

No matter who performs it, fixing the amount of the future tax rate is a purely political act, legislative in kind. There is no candid escape from that mental conclusion. Consequently, if the courts can supervise the conduct of it and correct it they perform a political act. By so doing the court legislates, takes part in the political act of fixing the amount of the future tax rate, departs from its high estate and independent position by thus taking part in political action.

It necessarily follows that words in the statute providing for a hearing must be construed in the light of the existing realties. The *public* notice merely apprises them to come to the equivalent of a mere legislative hearing, either to object to or support the proposed change in the statute, and

to prove facts in supplement of this investigation to that end. These words of the statute make this legislative hearing a condition precedent to a proclamation changing the statutory rate of tax. They provide that the Tariff Commission shall give reasonable *public* notice of its hearings and reasonable opportunity to the parties interested, that is, the persons, including *consumers,* affected, who, like the general public, of which they are a part, most emphatically are not parties to a lawsuit who would receive a legal summons. The whole process can take place, and a new tariff rate be fixed, without anyone, domestic producer, importer, or consumer, appearing. There are no necessary parties. There are no legal parties to the proceeding, because no legal right is determined. No one has a legal right to have a new tariff rate imposed. Before the Interstate Commerce Commission, even when it proceeds on its own motion, at least the carrier, the amount of whose charge is in issue, must be summoned to appear and is a necessary party to the proceeding. Otherwise there is no due process of law properly to determine a legal right.

The rule of reasonableness which the Interstate Commerce Commission enforces, namely, the right of the shipper to pay and of the carrier to collect no more than a reasonable toll for services rendered, existed at common law long before Congress was created. It was always judicially enforcible at common law. T. & P. Railway Co. *v.* Abiline Oil Co., 204 U. S. 426. Congress merely redeclared it in the Interstate Commerce Act.

Transfer of the carrier's right to charge a reasonable toll to commission control, subject to judicial review for arbitrary action and confiscatory action, is not, properly speaking, a delegation of congressional legislative power simply because Congress might have arbitrarily fixed nonconfiscatory tolls itself not subject to judicial review for unreasonableness or because arbitrarily imposed. The legal right to a reasonable toll is most emphatically not a formula for delegating legislative power.

The act of delegation does not change the power delegated. It does not change a tax into a toll or give it after delegation the legal incidents of a toll or make it subject to judicial review because arbitrarily or unreasonably imposed.

For a more detailed discussion of the nonlitigable character of the internal process of initiating and levying new taxes by Executive action under section 315 see the writer's dissenting opinion in the original Hampton case, T. D. 41478, 49 Treas. Dec. at pp. 626, 630, and 633, and opinion on the motion to dismiss at the Philadedphia docket in American Stores Co. *v.* United States, T. D. 44392, decided November 17, 1930. See also the discussion of the same subject in Judge Young's opinion in Fox River Butter Co. *v.* United States, T. D. 44667, decided February 24, 1931.

Up to this point we have proceeded on the assumption that section 315 is constitutional. Upon that assumption the above considerations would result in judgment for the defendant, either granting the Government's motion to dismiss or overruling the protest. But similar considerations also point unmistakably to the unconstitutionality of section 315 for the following reasons not advanced in the Hampton case.

No investigation starts except in the discretion of the Tariff Commission or the President. In United States Ex rel. Norwegian Nitrogen Products Co. *v.* United States Tariff Commission, 274 U. S. 106, Mr. Justice Stone said, p. 110:

> Under sec. 315 (*c*) and (*e*) of the Tariff Act of 1922, the President is given authority to require an investigation by the Commission and it is its duty to make one when so required. There is no other provision of the act placing any duty on the Commission to make such an investigation. When not so requested by the President, action by the Commission is discretionary. Under its rules it is optional with it whether it will employ its resources for investigations sought by an interested party.

It is equally certain that after the investigation is over the President may decline to follow the recommendation of the Tariff Commission and make no change in the tax rate. This is not denied by anyone. It actually happened in the sugar, linseed oil, and other investigations.

That means that however intelligent the purpose and plan of adjusting rates to cost difference may be, executives, and not the Congress, decide if and when it shall

operate, if and when it shall ever be carried into effect. It is not automatic and self-acting, but the Tariff Commission and President can legally refuse to put it into operation in whole or in part. This Executive discretion to start it or to refuse to end it is wholly legislative in character. Executive legislation, which the Constitution forbids, is the only name which can be applied to it. Thus the expediency and just operation of section 315 is unmistakably left to Executive will and discretion. This plain exercise of the legislative taxing discretion by Executive authority not only precludes any possibility of any judicial review of the internal process, but it just as plainly makes section 315 unconstitutional.

To render judgment for defendant would be to enforce a law believed by the writer to be unconstitutional. In his opinion a judgment should therefore be rendered for the plaintiff for the amount of taxes collected in excess of the statutory rate in paragraph 83 of the act of 1922.

This question of Executive discretion to decide if and when the formula shall operate was not raised, discussed, or expressly decided in Hampton *v.* United States, 276 U. S. 394. An unconstitutional law can not be enforced by the courts simply because plaintiff's counsel, after his client claims it is unconstitutional in the protest, mistakenly asserts that he believes it to be constitutional, pressing his claim for relief from the tax involved upon other grounds. The question of constitutionality is jurisdictional and raises itself whenever the unconstitutional law comes to be enforced by judicial decree. This question can not be overlooked in any case where the protest makes the express claim of unconstitutionality.

My associates seem entirely conscious of this, for, while they vigorously and categorically deny (on account of the way plaintiff's counsel presented his case) that the question of constitutionality is before us for decision, they, nevertheless, argue that section 315 is constitutional as necessary to their conclusion overruling the protest. For if section 315 is unconstitutional the protest can not be overruled.

In support of their holding they cite freely from the Hampton case, above and below, and broadly construe it as as deciding a question it does not discuss, namely,

whether Executive decision to put into effect the rate changing machinery or to refuse to do so vitiates the section.

This Executive discretion to refuse to start the process or refuse to carry out the purpose and plan of section 315 has another plain effect. It results in a new tax being initiated at the will of those outside of Congress in violation of the express terms of Article I, section 7, which reads:

> All bills for raising revenue shall originate in the House of Representatives; but the Senate may propose or concur with amendments as on other bills.

In my opinion that does not contemplate or permit an Executive decision as to whether a congressional rate of taxation shall be investigated for Executive change or permitted to remain in force. In my view, we should not look upon the commands in the Constitution against Executive legislation and against Executive initiation of a tax as something to be gotten around if possible but as something to support and defend whether we like them or not.

The above conclusion is not rested upon the expression in subsection (*c*) authorizing the use of "any *other* advantages and disadvantages in competition" mentioned in the proclamation as here used.

That indefinite expression necessarily includes (as the act expressly states) many things "*other*" than costs, which are entirely different from costs.

No one has yet explained how "cost differences" can be found from them. The Supreme Court's opinion in the Hampton case does not discuss the legal effect of the presence of these words in the statute, although the report of the case shows that the section was claimed to be unconstitutional because of them. Are they to be considered as not involved in that case? Again, are they to be treated as meaningless because unworkable as part of a cost-difference formula?

Their use (as well as the stated discretion to use them or not) necessarily involves a purely legislative discretion, for the expression includes everything relating to business success in competing with foreign rivals.

GEO. STEWART BROWN, *J.*

Judgment.

U. S. CUSTOMS COURT, FIRST DIVISION.

Protests 92852-G, etc.

NORWEGIAN NITROGEN PRODUCTS CO.

vs.

THE UNITED STATES.

This case having duly come on for trial before the First Division of the United States Customs Court, and the same having been heard and submitted for decision, and the Court, after due deliberation, having made and filed a decision herein, in favor of the defendant, and against the plaintiff, directing that judgment be entered herein in accordance therewith; now in conformity with said decision,

It is hereby ordered, adjudged and decreed that the protests in this case be, and the same are hereby, overruled.

Witness Hon. C. P. McClelland, Hon. J. B. Sullivan, Judges of the United States Customs Court, and the seal of said Court, at the City of New York, this 21st day of April, A. D. 1931.

J. W. DALE,
Clerk U. S. Customs Court.

Exhibit 1.

The White House, Washington.

October 6, 1922.

MY DEAR COLONEL MARVIN:

I am enclosing you herewith the Executive Order covering the reference of all applications for tariff revision to the Tariff Commission under such rules and regulations as the Commission may prescribe. I have not included the second paragraph of your suggested order because I assume that the Commission has the power to undertake such investigations as may be deemed desirable, and I can well believe there will be ample work to do without in-

stituting inquiries outside the many applications which are likely to be filed.

Very truly yours,

WARREN G. HARDING.

Col. Thomas O. Marvin, Chairman United States Tariff Commission, Washington, D. C.

Indorsed: U. S. Customs Court. Exhibit 1. Prot. No. 92852-G, &c. Date: 11/24, 1930. S. C. H., Reporter.

EXECUTIVE ORDER.

It is ordered, that all requests, applications, or petitions for action or relief under the provisions of Sections 315, 316, and 317, of Title III of the Tariff Act approved September 21, 1922, shall be filed with or referred to the United States Tariff Commission for consideration and for such investigation as shall be in accordance with law and the public interest, under rules and regulations to be prescribed by such Commission.

WARREN G. HARDING.

The White House, October 7, 1922.

Enclosure with White House letter of Oct. 6, 1922.

Exhibit 2.

Indorsed: U. S. Customs Court. Exhibit 2. Prot. No. 92852-G. Date: 11/24, 1930. S. C. H., Reporter.

United States Tariff Commission, Washington, D. C.

Executive Order and Rules of Procedure Before the United States Tariff Commission under Sections 315, 316, *and* 317 *of Title III of the Tariff Act Approved September* 21, 1922.

Executive Order

It is ordered, that all requests, applications, or petitions for action or relief under the provisions of Sections 315, 316, and 317 of Title III of the Tariff Act approved September

21, 1922, shall be filed with or referred to the United States Tariff Commission for consideration and for such investigation as shall be in accordance with law and the public interest, under rules and regulations to be prescribed by such Commission.

WARREN G. HARDING.

The White House, October 7, 1922.

Application for Investigation.

Application for an investigation under Section 315, 316, or 317 of Title III of the Tariff Act approved September 21, 1922, may be made by any person, partnership, corporation or association.

An application is not required to be in any special form but it must be in writing and signed by or on behalf of the applicant and in the case of an application under Section 316 it must be under oath. Every application must state the name, legal residence, business address, occupation and business connection of the applicant, and contain a short and simple statement of the relief sought and the grounds therefor.

No investigation shall be ordered by the Commission unless such application or preliminary investigation discloses to the satisfaction of the Commission that there are good and sufficient reasons therefor under the law.

If the information contained in the application is deemed by the Commission to be insufficient, the Commission may permit the applicant to amend the same or to submit evidence orally or in writing.

Preliminary Finding under Section 316.

In the case of applications for an investigation under Section 316 the Commission shall consider the application and the evidence submitted therewith with a view to determining whether the entry of any goods shall be forbidden pending further investigation in accordance with subdivision (*f*) of Section 316.

Investigations under Sections 315 and 316.

An investigation may be ordered by the Commission under Section 315 or 316 either upon the initiative of the Commission or upon application.

The Commission will not be confined to the issues presented in an application but may broaden, limit or modify the issues to be determined.

The Commission shall issue a notice of the nature and scope of any investigation which it may institute under Section 315 or 316 and such notice shall be published in "Treasury Decisions," and in the weekly edition of "Commerce Reports," by one insertion in each thereof.

Appearances.

Any person, partnership, corporation or association, showing to the satisfaction of the Commission an interest in the subject matter of an investigation ordered by the Commission, may enter appearance in such investigation in person or by a representative.

Hearings under Sections 315 and 316.

Parties who have entered appearances in investigations under Sections 315 and 316 shall be notified of the time and place of public hearings by registering and mailing a copy of the notice thereof addressed to each of such parties at the place of business thereof, and at such time and place, except on final hearing, such parties shall be afforded opportunity to offer such relevant testimony, both oral and written, as the Commission may deem necessary for a full presentation of the facts involved in such investigation.

Hearings shall be public unless the Commission orders otherwise.

Evidence, written or oral, submitted in hearings shall upon order of the Commission be subject to verification from the books, papers and records of parties in interest. Such further investigation may be had as the Commission shall order.

Invesigations and Hearings under Section 317.

If in any investigation under Section 317 it becomes necessary in the judgment of the Commission to order a hearing a notice shall be given and hearings hall be had, as provided with respect to hearings under Section- 315 and 316.

Witnesses and Subpœnas.

Witnesses unless otherwise ordered by the Commission shall be examined orally.

The attendance of witnesses and the production of documentary evidence may be required from any place in the United States at any designated place of hearing.

Any member of the Commission may sign subpœnas and members and agents of the Commission, when authorized by the Commission, may administer oaths and affirmations, examine witnesses, take testimony, and receive evidence.

The Commission may order testimony to be taken by deposition in any proceeding or investigation at any stage of any such proceeding or investigation. Such depositions may be taken before any person designated by the Commission and having power to administer oaths. Such testimony shall be reduced to writing by the person taking the deposition or under his direction and shall then be subscribed by the deponent. Any person, firm, copartnership, corporation or association may be compelled to appear and depose and to produce documentary evidence in the same manner as witnesses may be compelled to appear and testify and produce documentary evidence before the Commission.

Witness Fees and Mileage.

Witnesses summoned before the Commission shall be paid the same fees and mileage that are paid witnesses in the courts of the United States, and witnesses whose depositions are taken and the persons taking the same, except employees of the Commission, shall severally be entitled to the same fees and mileage as are paid for like service in the courts of the United States. Witness fees and mileage shall be paid by the party at whose instance the witness appears.

The Commissioner or Investigator in Charge of Investigations.

The Commissioner or investigator in charge of any investigation shall review all the evidence, oral and written, and all other information gathered in such investigation by the Commission, and shall summarize the same and prepare for the Commission in writing a report.

Parties who have entered appearances shall, prior to the filing of briefs, have opportunity to examine the report of the commissioner or investigator in charge of the investigation and also the record except such portions as relate to trade secrets and processes.

Briefs.

Briefs may be filed at the conclusion of the testimony in each investigation. The commissioner or investigator in charge of the investigation shall fix a time within which briefs shall be filed and notice thereof shall be given by registered mail to all parties of record.

Briefs shall be printed in such form and manner as the Commission shall direct.

Final Hearings and Findings.

Final hearings shall be before the Commission. Parties who have previously entered appearances may file briefs and upon permission being granted by the Commission present oral arguments. The findings of the Commission and of the members thereof shall be in writing and shall be transmitted, together with the record, certified by the Secretary under the seal of the Commission, to the President for his action under the law.

Appeals under Section 316.

Appeals on matters of law under Section 316 shall be governed by the rules relating to appeals to be taken to the United States Court of Customs Appeals from decisions of the United States Board of General Appraisers.

Exhibit 3.

File Copy.

Public Notice of Investigations by the United States Tariff Commission under the Provisions of Section 315 *of Title III of the Tariff Act of* 1922.

Investigation No. 7 by the United States Tariff Commission for the Purposes of Section 315 of the Tariff Act of 1922.

Sodium Nitrite.

The United States Tariff Commission on this 27th day of March, 1923, for the purpose of assisting the President

in the exercise of the powers vested in him by Section 315 of Title III of the Tariff Act of 1922 and under the powers granted by law and pursuant to the rules and regulations of the Commission, hereby orders an investigation of the differences in costs of production of, and of all other facts and conditions enumerated in said Section with respect to, the articles described in paragraph 83 of Title I of said Tariff Act, namely, Sodium nitrite, being wholly or in part the growth or product of the United States, and of and with respect to like or similar articles wholly or in part the growth or product of competing foreign countries.

Ordered further, that all parties interested shall be given an opportunity to be present, to produce evidence, and to be heard at a public hearing in said investigation to be held at the office of the Commission in Washington, D. C., or at such other place or places as the Commission may designate, on a date hereafter to be fixed, of which said public hearing at least thirty days' public notice shall be given by publication once each week for two successive weeks in "Treasury Decisions" published by the Department of the Treasury, and in "Commerce Reports" pubilshed by the Department of Commerce, copies of which said publications are obtainable from the Superintendent of Documents of the Government Printing Office in Washington, D. C.

And ordered further, that public notice of said investigation shall be given by posting a copy of this order thirty days at the principal office of the Commission in the City of Washington, D. C., and at the office of the Commission at the port of New York, and by publishing a copy of this order once a week for two successive weeks in said "Treasury Decisions" and in said "Commerce Reports".

I certify that the foregoing is a true copy of an Order of the United States Tariff Commission passed on the 27th day of March, 1923.

JOHN F. BETHUNE,
Secretary.

Indorsed: U. S. Customs Court. Exhibit 3. Prot. No. 92852-G, &c. Date: 11/24, 1930. S. C. H., Reporter.

Exhibit 4.

Filed Copy.

Public Notice of Hearing by the United States Tariff Commission under the Provisions of Section 315 *of Title III of the Tariff Act of* 1922.

Investigation No. 7 by the United States Tariff Commission for the Purposes of Section 315 of the Tariff Act of 1922.

Sodium Nitrite.

Notice is hereby given pursuant to Section 315 of the Tariff Act of 1922, that a public hearing in the foregoing investigation will be held at the office of the United States Tariff Commission in Washington, D. C., at 10:00 o'clock A. M., on the 10th day of September, 1923, at which all parties interested will be given an opportunity to be present, to produce evidence, and to be heard with regard to the differences in cost of production and of all other facts and conditions enumerated in Section 315 of the Tariff Act of 1922 with respect to the following article described in paragraph 83 of Title I of said Tariff Act, namely:

> Sodium nitrite, being wholly or in part the growth or product of the United States, and of and with respect to like or similar articles wholly or in part the growth or product of competing foreign countries.

This notice shall be published by posting a copy thereof for thirty days prior to said 10th day of September, 1923, at the principal office of the Commission in the City of Washington, D. C., and at the office of the Commission at the port of New York, and by publishing a copy thereof prior to said date once each week for two successive weeks in "Treasury Decisions" and in "Commerce Reports".

By the United States Tariff Commission this 20th day of July, 1923.

JOHN F. BETHUNE,
Secretary.

Indorsed: U. S. Customs Court. Exhibit 4. Prot. No. 92852-G, &c. Date: 11/24, 1930. S. C. H., Reporter.

Exhibit 5.

Indorsed: U. S Customs Court Exhibit 5 Prot. No. 92852-G, &c. Date: Nov. 24, 1930. S. C. H., Reporter.

BEFORE THE U. S. TARIFF COMMISSION.

Investigation No. 7, Section 315, Tariff Act of 1922.

In the Matter of the Investigation of the Costs of Production of Sodium Nitrite.

WASHINGTON, D. C., September 26, 1923.

The above-entitled matter came on for further hearing at the office of the United States Tariff Commission, 7th and E Streets N. W., at 10 o'clock a. m.

Present:

Commissioners MARVIN (Chairman), CULBERTSON (Vice-Chairman), BURGESS, GLASSIE, and COSTIGAN.

Present also: Secretary BETHUNE.

Appearances:

Mr. C. F. Graff, 907 Securities Building, Seattle, Washington, appearing in behalf of American Nitrogen Products Company.

Mr. Marion De Vries (De Vries & Dougherty), 406 Southern Building, Washington, D. C., appearing in behalf of Norwegian Nitrogen Products Company, 17 State Street, New York.

Proceedings.

The Chairman: The hearing in connection with the investigation of sodium nitrite is now open. Are there any parties present who desire to be heard?

Mr. De Vries: Mr. Chairman, since the last hearing we have received from the Commission, under date of September 15, 1923, a summary of information in the matter of sodium nitrite, the subject of a public hearing September 10, 1923. In the time allowed, we have not had opportunity to thoroughly examine the same, in the presence of

our clients, who are posted upon the facts, nor to get data thereupon from the points wherefrom we have to get it, to wit, Seattle and Norway. We cabled Norway as follows:

"Tariff Commission published result investigators' work abroad estimates your cost production at six kroners per dollar at 2.183 per hundred pounds at four kroners per dollar $3.27½ per hundred pounds deducting from average spring 1923 invoice value of 4.84 per Lb. CIF New York Pasking 0.204 inland freight 0.026 ocean freight and insurance 0.273 hundred pounds total charges 0.503 gives 4.34 per pound at factory this leaves about 100% profit please telegraph your instructions urgent for hearing 26th day of September."

To which we received the following answer:

"Your telegram 24/9 stop Tariff Commission estimate cost production completely erroneous cost production by far surpasses their estimate stop On principle we always refuse publish cost price consequently did not furnish investigators any information enabling them calculate cost price stop We thus strongly contest investigators' competence stop Your letter 12/9 with minute hearings received today stop No time study same but perusal permits state several Graffs statements regarding our company and process incorrect."

I want to submit to the Commission that the statute in this case permits interested parties who appear a reasonable opportunity to be present, to produce evidence, and to be heard. We were not given any data collected by the Commission until September 15, 1923, and the few days since, up to the present time, are not sufficient to thoroughly examine and digest the same, and obtain evidence in disproof of that, which we desire to submit.

Commissioner Culbertson: May I ask, Judge De Vries, at the last hearing of this case, were there not present with you in the hearing room three of your clients?

Mr. De Vries: There were——

Commissioner Culbertson (interposing): Would you mind——

Mr. De Vries (continuing): One of my clients, Mr. Culbertson.

Commissioner Culbertson: There were three, however, who were informed to some extent concerning the subject of sodium nitrite.

Mr. De Vries: I can speak for but one. I can speak for my own client, Mr. Lodrup. Candidly, Mr. Culbertson, I do not know; I do not recall at the moment of any other parties who were interested. The Norwegian Consul was here. I do not believe a consul or minister is interested in this proceeding.

Commissioner Culbertson: The Commission had no opportunity at that time to get information from your client.

Mr. De Vries: No, sir. As I read the statute, our client, being an interested party, has a right to be present, to produce evidence, if he wants, or not, and to be heard, without submitting himself to the jurisdiction of this Commission for examination, and without submitting to this Commission, in consideration of his statutory rights, any evidence of others or of himself. We understand that the statute accords our client certain rights, to be present and to be heard, and to produce evidence without any consideration therefor, and the statute does not exact, as I have stated before, as a condition precedent, that before we can enjoy these statutory rights we must submit any evidence as to any of our processes, any of our costs, or any other data.

Commissioner Culbertson: My only point is that he was present at the last hearing.

Mr. De Vries: He was.

Commissioner Culbertson: And did not tender any information which he had.

Mr. De Vries: He did not tender any information, and I do not assume that he had any information. I do not think the Commission can rightly assume, for the purposes of this proceeding, that he had any information.

The Chairman: Mr. De Vries, is the assumption correct, that your client knows from personal knowledge the cost of production of sodium nitrite in Norway?

Mr. De Vries: I do not think that assumption is correct. As a matter of fact I know it is not correct, and that answer is fully substantiated by the situation of the plants that are producing nitrite in Norway and the United States.

The Chairman: You made the statement that the time permitted has not given you an opportunity to prepare your case and present evidence in refutation of testimony presented, and to obtain correct information from Norway as to the actual costs of production in Norway.

Mr. De Vries: I did not say——

The Chairman (interposing): Are you asking for an extension of time to enable you to obtain this information?

Mr. De Vries: Yes, sir; I ask for 30 days, deeming that a reasonable extension.

The Chairman: If an extension of time is granted, does the Commission understand that we will receive from you definite figures of the cost of production of sodium nitrite in Norway?

Mr. De Vries: Mr. Chairman, I am not bartering for what I am asking. I am not offering any consideration.

The Chairman: The Commission must know, it seems to me——

Mr. De Vries: I am asking, Mr. Chairman, let it be distinctly understood, for our statutory rights before this body, without any consideration therefor, except the rights the law affords us, of a fair hearing and a reasonable time to present our testimony, if we may see fit to testify.

Commissioner Culbertson: The question is whether the time is reasonable.

Mr. De Vries: That is the whole question, Mr. Commissioner.

Commissioner Culbertson: That cable which you have just read from Norway interests declines to give the information which the Commission would like to have from Norway. Therefore, that cannot be gotten in any length of time. It then comes down to the question of whether or not you have had a reasonable time to examine the information which you now have in your possession.

Mr. De Vries: I do not think that quite accurately measures the situation, Mr. Commission. The Commission is asking us to produce the cost of production in our own factory. That is not all the evidence of the cost of production of sodium nitrite in Norway. I may go further and say that the cost of production in the factory of the Norwegian Products Company might be found by this Commission not to be the fair cost of production, or the cost of production in Norway.

Now, the Commission's own report shows that to be true, and proceeds upon the correct principles, to my mind, under the statute, that they gather whatever evidences of cost of production are available in Norway. Now, they have produced certain costs of production in Norway. We say that those proofs that are produced here are not accurate and are not the true costs of production, and we want the right to produce evidence to disprove the figures that are submitted by the Commission. We may disprove it by evidence *aliunde*. We may disprove it by statements from our own factories. That is for us to determine; but the cost of production in these cases, as I read the statute, is not the cost of production of any particular factory, at home or abroad.

If, as was suggested upon this particular statute before the Ways and Means Committee, when a similar statute was offered, we undertook to grow pineapples in Maine, and were unsuccesful, because we could not come in and get an increased tariff rate to grow pineapples in Maine. So the cost of production in Mr. Graff's factory in Seattle is not necessarily the finding upon which this Commission is going to predicate these duties. The question is, what is the cost of production in the United States, and not what is the cost of production in Mr. Graff's factory in Seattle. Upon these subjects we are ready to offer proof, and to do so it is not necessary for us to exhibit to this Commission the costs of production in our own factory.

Mr. Graff: Mr. Chairman, am I to understand that the opposition is now asking for additional time in which to produce proof as to foreign costs of nitrite?

The Chairman: That is the nature of the request.

Mr. Graff: And to submit additional evidence along that line. If so, I object, on the ground that the hearing was absolutely closed on September 10 last. Furthermore, that they had ample time previously, through proper public notice, in which to produce their proof.

The Government expert visited Norway and Germany and other countries for the purpose of ascertaining costs, and had obtained information in so far as they could get it. The Norwegian producers refused to disclose their costs, and if they now come in and ask, through cablegrams, or otherwise, for additional time, after the matter

has been discussed in public hearing, I object, of course, to that grant of time.

Mr. De Vries: Of course, Mr. Chairman, in reply to that, we are relying strictly upon the statute. The statute says that in these investigations, the interested parties shall have the right to be present, to produce evidence, and to be heard. They shall have reasonable opportunity to be present, and a reasonably opportunity to be heard. That is the language of the statute, to be present, to produce evidence, and to be heard upon the subject of these investigations.

Now, the subject of this investigation is produced to the interested parties under date of September 15, 1923, in which is set forth in detail a tentative cost of production in Norway. We therefore submit that under the statute we have a right to a reasonable time to examine that statement, and if we see fit, to produce evidence in disputation thereof, or to be heard thereupon.

Commissioner Glassie: Judge De Vries, didn't you have a reasonable time, when you had reasonable ground to anticipate that the results of the inquiry in Norway would be made known, and if they were not to your liking, you could rebut them when they were made known?

Mr. De Vries: Quite true, Mr. Glassie. I am glad you asked the question. You served on our clients a copy of the petition in this case. It set forth that the plant in Seattle represented an investment of $1,229,000, and asked interest upon it. We spent days and nights, and money, in gathering evidence in disputation thereof, and when we appeared in this tribunal ready to disprove those allegation, we were told that in the secret files of this Commission were other data, and that they were out of the way; so that I say to you——

Commissioner Glassie (interposing): If you prepared yourself to meet a merely collateral issue, which obviously cannot determine the matter in controversy, and failed to prepare yourself to meet the very point in issue, why do you lay the responsibility on the Commission?

Mr. De Vries: I am not laying the responsibility on the Commission. I am laying it on the situation. In answer to that, the only statement of cost was in that petition, that we knew of, of investment and cost that we knew of,

and the petition prayed that a rate of duty be fixed that would realize interest upon that statement of cost.

The Chairman: Judge De Vries, according to the statute——

Mr. De Vries (interposing): We cannot tell what we have to meet until it is before us. We did not know what we had to meet in this case until it was before us in this statement.

Commissioner Glassie: You have the first knowledge of your own costs, and that being the issue, ample time being given to you to meet that issue, it seems to me that if you were not satisfied, that was the time to give such information as you possessed.

Mr. De Vries: Our own costs are but half of the case.

Commissioner Glassie: I am referring now entirely to your own costs.

Mr. De Vries: Our own costs are but half the case.

Commissioner Glassie: The people in Norway refused to give direct access, as I understand it, to their books. They knew that the issue was cost, and their cost, the difference between their cost and the American cost, involving their cost. They knew that a hearing was to be had, in which that would be the principal and main issue.

Mr. De Vries: Yes, sir.

Commissioner Glassie: Having declined to give that information, and knowing that the hearing was relating to that issue, it would seem reasonable that they should have come to that hearing prepared to disclose, if they ever intended to disclose——

Mr. De Vries: I do not understand that we have to come forward with any evidence whatsoever, as a condition precedent to enjoying the rights the statute gives us, to be present in these cases, and to hear the evidence that is produced against us, to produce evidence against that, and to be heard upon that evidence. That is a part of the petitioner's case, to prove his cost of production and that abroad, or for this Commission to investigate and so find, and we have a right to be heard upon that proof, and those findings, under the statute.

The Chairman: Judge De Vries, according to the statute, the issue in this case is the difference in the cost of production. As counsel for one of the parties, you knew

months ago that the issue would depend upon, or turn upon the difference in cost of production. The Commission will rule that in its opinion you have had ample time to prepare a statement of costs of production for your clients and meet the issue at the hearing before the Commission, and will decline the request for a further extension of time for hearings in this case.

Mr. De Vries: To that ruling we except.

The Chairman: Very well.

Mr. Graff: Mr. Chairman, I take it for granted that no additional evidence, under that ruling would be permissible in so far as costs on the part of the opposition are concerned. In other words, that the evidence and testimony are supposed to have been closed as of the last hearing.

The Chairman: The notice was served upon the parties in interest that this adjourned hearing on sodium nitrite, set for September 26, would be postponed or adjourned until October 4th. Am I correct?

Mr. De Vries: Yes. We received a notice of that kind.

The Chairman: That is the status of this case at present.

(At this point followed a conferenec at the Bench between the Commissioners, at the conclusion of which the following occurred:)

Mr. Graff: Mr. Chairman, if the purpose here is merely to extend the time up to October 4th, for final argument, of course, that is entirely satisfactory to us; but if the purpose is to permit the introduction of additional evidence, we again, of course, would object. We think that the opposing counsel's attitude is absolutely absurd. He makes the point that the Government submitted certain information. We neither had access to that information before it was produced. We were exactly on the same basis. They had their opportunity to produce costs, and they refused. We had our opportunity, and willingly granted every access to the Government, to make the investigation. We then testified, produced certain facts, and they cross-examined us.

Now, after this has all been done, as I understand it, they come in and ask for permission to produce evidence and rebut our cost evidence, as well as the Government's. I think it is absolutely absurd and should not be granted.

The Chairman: A statement of facts in the possession of the Commission was handed to counsl on each side, and the Commission is of the opinion that a reasonable opportunity to meet the statements submitted as to the facts in the possession of the Commission is proper and right. On October 4 the Commission will be ready to hear further arguments in this case, and such evidence as counsel have to offer in connection with the statement of facts in the possession of the Commission, which was submitted to counsel.

Mr. De Vries: Now, Mr. Chairman, in reference to October 4th, without waiving our request to grant further time, or to grant 30 days, October 4, I believe, falls on Thursday next.

The Chairman: Thursday is correct, yes, sir.

Mr. De Vries: I wish the Commission could give us a litle more time. I want to make what showing can be made in the limited time, without waiving our rights, but I wish the Commission would extend that to the following Monday, for the reason that, as a personal matter, I am compelled to go into a hospital in New York on Monday, and will be there until Thursday, and it will be a physical impossibility to meet this situation on the 4th.

Commissioner Glassie: We will be very glad to extend it.

The Chairman: We will be very glad to accommodate you. There is nothing set on that date.

Mr. De Vries: Mr. Chairman, I would like the indulgence of the Commission to make a few formal requests.

As you all know, these proecedings do not conccern this case alone. I want to make formal requests, as an interested party appearing in this case, that we have reasonable opportunity to inspect and to be heard upon all evidence which has been offered in this case, not deemed by the Commission trade secrets, or not, in fact, trade secrets or processes. That is request No. 1.

We want to make the further request that the Commission afford us the same rights to inspect, and to offer evidence in disputation thereof, if we see fit, and to be fully heard upon, all the evidence in the possession of the Commission, as to the cost of power in the United States in the production of nitrite.

Third, the same request as to the number of laborers

employed, and the wages paid in the American Nitrogen Products testimony submitted before this Commission.

Fourth, the same request as to all capital invested in the American Nitrogen Products Company plant in the State of Washington.

Fifth, referring to the summary of information in the matter of sodium nitrite, the subject of a public hearing September 10, 1923, that we have opportunity to cross-examine the experts of this Commisison who gathered this testimony, as to the testimony which they have submitted to the Commission, and that we have the right to offer such testimony as we may see fit in opposition thereto, and that we have the right and reasonable opportunity, to be heard thereupon.

The Chairman: The request will be taken under consideration.

Commissioner Glassie: How shall we announce our decision on that? It must be done before October 4.

The Chairman: It must be done before October 4.

Commissioner Glassie: You will be notified in writing prior to October 4.

The Chairman: Counsel will be notified in writing by the 4th.

Mr. De Vries: I thank the Commission for its indulgence.

The Chairman: Is there anyone else who desires to be heard?

Mr. Graff: It may not be possible for me to remain as long as that, and, of course, if I am not here, I shall not be able to testify.

The Chairman: The Commission hopes, Mr. Graff, that you may find it possible to be present. If it is not possible for you to arrange to be present, such briefs as you care to leave with the Commission will have careful consideration and the case will have consideration by the Commission in view of all the facts presented, your oral testimony, the briefs that you have filed, and the testimony presented by the opponent's petition.

Commissioner Costigan: May I ask, Mr. Graff, whether you have been staying here at some personal inconvenience to yourself?

Mr. Graff: I should say I have; and I, of course, am not objecting to this extension, because, as I understand it, it is a personal matter with Judge De Vries, and I cannot reasonably object. Certainly it is very inconvenient for me. I was going to say, when he asked for the extension until October 8th, on account of having to go into the hospital on the preceding Monday, that the date be advanced to the preceding Saturday, so the hearing could be held before; in other words, a day or two earlier, rather than three or four days later.

Mr. De Vries: That would be all right, understanding, however, that this consent of ours to any hearing short of 30 days is excepted to. Let it be the following Saturday.

Mr. Graff: If that could be arranged, I would certainly appreciate it.

Commissioner Costigan: What date have you in mind, Judge De Vries, this coming Saturday, or Saturday week?

Mr. De Vries: Saturday week. That is the 6th, isn't it?

Commissioner Costigan: Yes.

Mr. Graff: Understand, gentlemen, that I should like to be——

The Chairman (interposing): I understand it was a date prior to October 4.

Mr. Graff: I should like the date advanced as far as possible. I am simply staying here to wait for this hearing.

The Chairman: There would be no opportunity, Judge, to advance the date prior to October 4.

Mr. De Vries: Certainly not; not so far as I am concerned.

Mr. Graff: I asked that it might be.

Commissioner Glassie: That was Mr. Graff's suggestion, and we understood you to agree to it.

Mr. De Vries: No.

The Chairman: We understood you to agree to that.

Mr. De Vries: No. I understood his request to be to advance it from the 8th to the Saturday preceding, which would be the 6th.

Commissioner Glassie: Do you feel that you can surely attend on the 6th?

Mr. De Vries: I will be here. Understand, we have to print briefs. We have to write briefs and get the documents together.

Mr. Graff: Mr. Chairman, may I ask if it could be advanced to any day during that week, that is, some time between October 1st and October 6th?

The Chairman: Judge, October 4 is too early a date, we understand?

Mr. De Vries: Yes.

The Chairman: And October 6th would be agreeable to you, Saturday, October 6th?

Mr. De Vries: If some date is to be set so soon as that, yes. It will take two or three days to print the briefs.

Commissioner Glassie: Mr. Graff, it does not make much difference between the 6th and the 8th?

Mr. Graff: Every day counts, of course.

The Chairman: If it is agreeable to both parties, the date for the adjourned hearing on sodium nitrite will be fixed for Saturday, October 6th.

Commissioner Glassie: And the same statements made with regard to the 8th will apply to the 6th.

Mr. De Vries: With the understanding, of course, Mr. Chairman, that I except to any date earlier than 30 days from date, as not being a reasonable opportunity. I will be here on the 6th, to comply, in so far as I can, with the Commission's order.

Commissioner Costigan: I do not understand, Judge De Vries, that you have excepted to the 6th of October, but that you except generally to the refusal of the Commission to extend the time for 30 days, for any further hearing.

Mr. De Vries: Yes; and any longer time than the 6th.

The Chairman: Are there any other parties who desire to be heard? If not, the hearing will be adjourned to Saturday, October 6th.

Commissioner Glassie: Will you be here on the 6th, Mr. Graff, do you think?

Mr. Graff: I will try to be here.

Commissioner Glassie: We have changed it from the 8th to the 6th, to accommodate you. It is impossible to advance it any further.

Mr. Graff: I shall certainly try to be here.

The Chairman: If there are no other parties to be heard, the hearing stands adjourned until Saturday morning, October 6, 1923, at 10 o'clock a. m.

(Whereupon, at 10:40 o'clock a. m., the hearing in the above entitled matter was adjourned until Saturday, October 6, 1923, at 10 o'clock a. m.)

Exhibit 6.

Indorsed: U. S. Customs Court. Exhibit 6. Prot. No. 92852-G, &c. Date: 11/24, 1930. S. C. H., Reporter.

BEFORE THE U. S. TARIFF COMMISSION.

Investigation No. 7, Section 215, Tariff Act of 1922.

In the Matter of the Investigation of the Costs of Production of Sodium Nitrite.

WASHINGTON, D. C., September 10, 1923.

The above-entitled matter came on for hearing at the office of the United States Tariff Commission, 7th and E Streets Northwest, at 10 o'clock a. m.

Present:

Commissioners MARVIN (Chairman), CULBERTSON (Vice-Chairman), BURGESS and GLASSIE.
Present also: Secretary BETHUNE.

Appearances:

Mr. C. F. Graff, 907 Securities Building, Seattle, Washington, appearing in behalf of American Nitrogen Products Company.

Mr. Marion De Vries (De Vries & Dougherty), 406 Southern Building, Washington, D. C., appearing in behalf of Norwegian Nitrogen Products Company, 17 State Street, New York.

Mr. A. Lundh, Commercial Counselor, Norwegian Legation, Washington, D. C.

Proceedings.

The Chairman: The hearing in connection with the investigation of the cost of production of sodium nitrate is

now open. Opportunity will be afforded for witnesses to present testimony, the witnesses for the petitioner being heard first. All witnesses will be sworn. The Secretary will read the order of investigation.

The Secretary: On the 27th day of March, 1923, the United States Tariff Commission adopted the following order:

"The United States Tariff Commission on this 27th day of March, 1923, for the purpose of assisting the President in the exercise of the powers vested in him by Section 315 of Title III of the Tariff Act of 1922 and under the powers granted by law and pursuant to the rules and regulations of the Commission, hereby orders an investigation of the differences in costs of production of, and of all other facts and conditions enumerated in said Section with respect to, the articles described in paragraph 83 of Title I of said Tariff Act, namely: Sodium Nitrite, being wholly or in part the growth or product of the United States, and of and with respect to like or similar articles wholly or in part the growth or product of competing foreign countries.

"Ordered further, that all parties interested shall be given an opportunity to be present, to produce evidence, and to be heard at a public hearing in said investigation to be held at the office of the Commission in Washington, D. C., or at such other place or places as the Commission may designate, on a date hereafter to be fixed, of which said public hearing at least thirty days' public notice shall be given by publication once each week for two successive weeks in 'Treasury Decisions' published by the Department of the Treasury, and in 'Commerce Reports' published by the Department of Commerce, copies of which said publications are obtainable from the Superintendent of Documents of the Government Printing Office in Washington, D. C.

"And ordered further, that public notice of said investigation shall be given by posting a copy of this order for thirty days at the principal office of the Commission in the city of Washington, D. C., and at the office of the Commission at the port of New York, and by publishing a copy of this order once a week for two successive weeks in said 'Treasury Decisions' and in said 'Commerce Reports'."

On the 20th day of July, 1923, the Commission adopted the following order:

"Notice is hereby given pursuant to Section 315 of the Tariff Act of 1922, that a public hearing in the foregoing investigation will be held at the office of the United States Tariff Commission in Washington, D. C., at 10:00 o'clock A. M., on the 10th day of September, 1923, at which all parties interested will be given an opportunity to be present, to produce evidence, and to be heard with regard to the differences in cost of production and of all other facts and conditions enumerated in Section 315 of the Tariff Act of 1922 with respect to the following article described in paragraph 83 of Title I of said Tariff Act, namely: Sodium nitrite, being wholly or in part the growth or product of the United States, and of and with respect to like or similar articles wholly or in part the growth or product of competing foreign countries.

"This notice shall be published by posting a copy thereof for thirty days prior to said 10th day of September, 1923, at the principal office of the Commission in the city of Washington, D. C., and at the office of the Commission at the port of New York, and by publishing a copy thereof prior to said date once each week for two successive weeks in 'Treasury Decisions' and in 'Commerce Reports'."

These several orders have each been published as required in their terms. They have been posted at the office of the Commission in Washington and at the office of the Commission at the port of New York.

The Chairman: Witnesses desiring to offer testimony will now be heard. Witnesses will give their names and addresses and whom they represent.

Mr. De Vries: Mr. Chairman, I would like to say that I appear on behalf of the Norwegian Nitrogen Products Company of New York in opposition to this petition.

Preliminarily, I would like to make formal request that we be supplied with a full and complete copy of the petition herein, instead of the petition with part of the facts eliminated therefrom. I make that formal request as a matter of record, and shall present some matters to the Commission on it at a later time.

Mr. Graff: My name is C. F. Graff. I am the President and General Manager of the American Nitrogen Products Company, of Seattle, Wash.

The Secretary: Are you going to testify or appear as counsel?

Mr. Graff: I am appearing on behalf of our company, as the only counsel.

The Secretary: Are you testifying, or just appearing as counsel?

The Chairman: He appears to give testimony, and the witness will now be sworn.

Mr. Graff: I presume I will have to testify.

Testimony on Behalf of Applicant.

C. F. Graff was called as a witness and, having been first duly sworn, testified as follows:

Direct examination:

The Witness: First, with respect to the request of counsel for the opposition, to the effect that they be furnished with complete copies of our petition, and the data furnished, we object to this for the reason that we have been promised by the Commission that confidential information would be so treated. A large part of the information furnished in those briefs and data is confidential, and was so marked at the time. We are perfectly willing to give any and all data to the Commission, and have done so, but we expect to be protected under the ruling as made to that effect.

The Chairman: The Commission will protect the confidential nature of all information submitted to it.

The Witness: The American Nitrogen Products of Seattle, Wash., is an American corporation organized for the purpose of establishing the air nitrate industry in this country. We erected a plant in 1917 at or near Seattle, using the electric art method for the fixing of nitrogen from the air, which is the method also employed in Norway. We have built a plant there for the exclusive manufacture of sodium nitrite, which was the first and proper logical step in establishing the industry by this method. This plant has been developed and has grown until it is

now a thoroughly efficient plant manufacturing this product as a major product, and only product.

By the Chairman:

Q. Mr. Graff, was there any sodium nitrite produced in this country prior to the war? A. Yes, sir, there was, but not by this method.

Q. Was there any considerable quantity? A. In very small quantities in this country. It was made prior to the war in a roundabout way by what is known as the lead process.

Q. You established this plant for the production of sodium nitrite at a time when the customary source of supply was shut off because of war conditions? A. Yes, sir, in order to meet the needs of the dye industry.

Q. Sodium nitrite is used for what purpose? A. Sodium nitrite is used primarily in the manufacture of dyes, largely in the manufacture of what is called the azo group of dyes.

Q. Dye manufacturers, then, are the chief consumers? A. Yes, sir; it is also used in the paint and ink industries and by the textile manufacturers. It is an absolutely necessary element in those manufactures.

Q. A complete chemical industry in this country, then, would require an available source of sodium nitrite? A. Absolutely; and that is proven by the fact that during the war when it was impossible to import from Europe, as had always been done prior to the war in large quantities, the price of sodium nitrite rose from a pre-war level of about 6 cents per pound to 60 cents per pound.

By Mr. De Vries:

Q. Rose from what to what? A. From a pre-war price of 6 cents per pound to a maximum of 60 cents per pound. This was on account of the urgent necessity for the material on the part of the dye manufacturers.

At about that time we succeeded in getting our plant under way, and we were able to fulfill a very large portion of the demand, and the price again began to drop; and at about the time of the armistice, as I remember it, the price was down to around 12 or 15 cents a pound.

Mr. Chairman, I wish to again emphasize the fact that our plant is exclusively devoted to the manufacture of this product, and that this was a logical proposition from the manufacturing standpoint in the early stages of the game. The company is aiming and expecting to enlarge its plant and build another plant where the product will be made, not as a major product, but more or less as a by-product, as is now done in Norway. In Norway the Norsk Hydro Kvaelstofaktieselskab of Kristiania, Norway, is a very large concern, which was begun in or about the year 1903, copying a method for the fixing of nitrogen from the air which had previously been experimented with by Messrs. Bradley & Lovejoy, Americans, at Niagara Falls. The Bradley-Lovejoy attempt at Niagara Falls failed largely on account of financial troubles; also on account of practical difficulties. Dr. Eyde of Norway, and Prof. Birkeland, of Kristiania, Norway, then began a somewhat similar—in fact, the same process, using a different form of arc, and they succeeded in developing this highly efficient commercial method of fixing nitrogen. They have built a plant over there of huge proportions, raising the capital primarily in France. The latest report I had on the investment was something over $50,000,000. They have a plant there which is not a sodium nitrite plant, as such. It is a fertilizer and acid plant, and they manufacture their sodium nitrite as a by- or end product. In other words, they cannot help but make it. The process, briefly, Mr. Chairman, is to burn the air in furnaces, making a nitric oxide gas, that is, a combination of the nitrogen and the oxygen in the air, which combine chemically, making a nitric oxide gas, and this gas is then oxidized and passed through absorption towers, where they manufacture acid, catching the gas in water in the towers; but all of the gas cannot be caught in the water. Some of it escapes, and in order to catch the escaping gas they circulate a soda solution in the water in the last tower, which gives them the sodium nitrite as an end product. This sodium nitrite can then again be treated with nitric acid, and made into a sodium nitrate, which, of course, involves an extra cost. So, the Norwegians, in disposing of their soda product, or end product, will sell all that they can as nitrite, because of the fact that that brings a higher

price, and that which they cannot sell as such they will transpose by acid into a nitrate and sell that in competition with the Chilean nitrate, or fertilizer which comes here from Chile in enormous quantities. So, Mr. Chairman, from the standpoint of cost it really makes no difference to the Norwegians whether they sell the nitrite as such or as nitrate. In reality, it makes no difference whether it is sold as nitrate or nitrite. They will get what they can, of course, for the nitrite as such, and the more they get, the less the price of the primary product, which is the fertilizer.

By Commissioner Burgess:

Q. You have no by-product by your process? A. No, sir. As the result of this ability on the part of the Norwegians to sell the product very cheaply, the domestic manufacturer of nitrite has been in severe danger for a long time.

As soon as the shipping began across the Atlantic Ocean after the war, the product again began to arrive in this country and the price was forced down so that we could not compete. We then appealed to the House Ways and Means Committee for relief under the then proposed Fordney Tariff Bill, submitting briefs on that subject, and that is part of the record here, I believe, where we asked for a duty of 5 cents per pound. The House Ways and Means Committee fixed the duty at 3 cents. When the bill went before the Senate Committee they also fixed the duty at 3 cents per pound, and it came out of conference at that figure; whereupon Senator Jones of Washington, who was thoroughly conversant with the industry out there, and our trouble, had the 5 cents per pound duty passed on the floor of the Senate. They decided in favor of the higher rate, but this rate was again revised downward the following day, largely on account of personalities passing on the floor, so that the duty remained at 3 cents per pound.

After this we took the matter up with the War Trades Board, who exercises like control over the importation of dyes. For some reason sodium nitrite had been eliminated from the schedule of dyes, although it is a primary product in the manufacture of dyes, and when this was shown to the War Trade Board, considering the importance

of the product to the country, they issued an order including sodium nitrite under the license control.

When the emergency tariff became effective, a month or six weeks later, it was, of course, still protected under this emergency tariff, and the protection remained until the time of the effectiveness of the permanent tariff, September 21, 1922. Up to this date the importations, of course, were stopped or controlled, and we again came into the market and were able to so something.

As soon as the permanent tariff went into effect, September 21, 1922, large quantities again began to arrive, and the price—I have a schedule showing those importations, but I think that has been submitted to the Commission. At any rate it came in in large quantities and the price went down, so that we could not compete. Then is when we appealed for relief to the United States Tariff Commission, submitting our first brief on October 24, 1922. We followed this by another brief or two later, on January 22nd, I think, and February 9. I dignify them by the name of "briefs," merely because they were rather voluminous. They were, in fact, nothing but long letters and data.

We also took it up directly with the President, and the President wrote a letter to the Commission requesting expedition of this matter in view of its urgency. We also had a letter from the President on that subject.

We were told by the Commission that under the procedure it would be necessary for us to submit our actual costs of production, which we did. These costs were afterwards verified by a visit on the part of two experts from the Commission to our Seattle head office, and to our La Grande plant, the plant having, in fact, been also previously visited by Mr. Costigan, of the Commission, who directed the investigation to proceed.

Having submitted these costs and all the data requested, we were then advised that the Commission found it necessary to investigate foreign costs of production as a basis for comparison, and we were told that it would still be several months before action could be had.

The Commission's experts then proceeded to Europe, including Norway, I believe, and Germany, and, as I understand it, they secured certain data and are now here to discuss the matter.

Mr. Chairman, the costs of domestic production of nitrite submitted, as compared with data and evidence furnished as to the costs of foreign production, justify fully the increase asked by us of 50 per cent, or another 1½ cents per pound, making the total duty 4½ cents per pound.

We therefore ask that this increase be granted, and, in view of the length of time consumed, and in view of the great emergency for protection, we would also request that the matter be fully discussed here today and concluded, and the recommendation go forward to the President.

By the Chairman:

Q. Mr. Graff, as I recall, you said your plant was established in 1917? A. Yes, sir.

Q. Can you give us, briefly, an account of your operations from that time, how much sodium nitrite was produced the first year of operation, and what the production has been since? A. I beg your pardon, Mr. Chairman?

Q. Can you give a brief statement of the amount of sodium nitrite produced by your company since 1917, when your plant was built? A. I will answer it in a general way. We have produced several thousand tons. We have produced a great proportion of the country's requirements, and our capacity now constitutes a great proportion of the country's requirements.

Q. Can you tell us what is the amount of sodium nitrite required by the chemical industry and other industries using it in this country? What is the total demand for sodium nitrite in this country, and how much of it is your plant capable of supplying? A. We are capable of supplying a majority of it, over 50 per cent of the total requirements, and the total domestic production in this country is able to take care of the country's requirements. You understand that there are two or three other manufacturers of the product besides ourselves. We have, Mr. Chairman, furnished very complete data in detail as to our particular capacity, but, as stated before, we have been promised that this matter would be treated confidentially, and I would like to have it remain that way, if you please.

By Commissioner Burgess:

Q. The matter of the total consumption of nitrite in this country is not a confidential matter? A. Oh, no, sir; no in-

deed. As I stated, the country's consumption is several thousand tons; we will say, between three and five thousand tons per annum.

Q. The total demand? A. The total approximate consumption in this country. I presume that your own experts have verified those figures, and will probably confirm me on that. What I stated was that our production capacity constitutes over 50 per cent of the requirements, and that the entire domestic production in this country will approximately take care of the country's consumption, because there are other manufacturers.

Q. I understood you to say, Mr. Graff, that a large percentage of the Norwegian production went into fertilizer. A. No, sir; not of sodium nitrite.

Q. Didn't you mention fertilizer? A. But they transpose the nitrite by treating it with acid. When they cannot sell it as nitrite, they treat it with acid and make it into nitrate, and sell that as fertilizer.

Q. What is their main product? A. Their main product is fertilizer, calcium nitrate.

Q. That is what I understood; and the nitrite is a by-product. A. Both the nitrite and the nitrate are by-products with them. Their main production is calcium nitrate, which is a fertilizer. That is their primary product.

Q. In that way they can produce the nitrite at a much reduced cost as compared with your cost? A. Yes.

Q. We use fertilizer in this country to a very large extent. Is there any reason why you can not follow the same process and reduce your cost of the nitrite? A. Absolutely not; and that is what we are aiming at. We intend to do that very thing, but it will take time. There is a great deal of discussion in this country as to what may be done along this line, but it can be done in our western territory, where we have water power, and that is our purpose. But, as I explained before, our first step was to produce nitrite as a major product, because we could handle that at the time, whereas, with the production of nitrite, which we now have, we were compelled to only put in a fairly good sized plant. If we had put in a plant for fertilizer, expecting to mix it as a by-product, we would have had to put in a plant approximately seven times as large, and that we can only do after demonstration of our proposition as now conducted, the feasibility of our furnaces, and our general operations.

Q. So that the development of a fertilizer plant or outfit would require reorganization, recapitalization, and enlargement? A. Simply enlargement, yes, sir.

Q. About how long a time would that take to put it in that shape? A. We do not think that will take very long now.

Q. About how long? Six months, or a year, or two years? A. Mr. Burgess, I would say that that would depend largely on our success in marketing our product. If our success in marketing our product and sales is no better in the future than it has been in the past year, there is not much chance.

Q. What I am getting at is this. If additional protection is given to the industry at the present time, it perhaps would only have to be a temporary help and protection. A. We naturally expect to reduce our costs in the future.

By the Chairman:

Q. In reply to my question, Mr. Graff, you stated that the domestic producers of sodium nitrite would be able to supply practically the entire American demand. The next question I would like to ask is, could that be supplied at a reasonable price? A. Yes, sir.

By Commissioner Glassie:

Q. What do you mean by "a reasonable price"? A. I think that a reasonable price is the pre-war price plus the ordinary increases in the general market, approximately speaking.

By the Chairman:

Q. By "reasonable price", naturally I mean a price that corresponds reasonably with the record of prices during the times of normal production. A. Yes, sir.

Q. You testified that the price during the war went as high as 60 cents a pound. It is now about 12. A. As matter of fact, Mr. Chairman, at the present time the price is not a reasonable one at all, when judged from that standpoint. Other materials are all up. Sodium nitrite is down to almost the pre-war price, and the reason for that is that the foreigners, in order to overcome the extra duty of 2½ cents per pound over and above the Underwood ½ cent per pound, are selling it in this country at a lesser price than they are in their home markets, in the European

markets, and when that was brought to the attention of the Anti-Dumping Unit, acting under the Anti-Dumping law of 1921, they recently issued instructions to the appraisers at the ports of entry to withhold appraisement entries on this product. I cite that as a side light on the general proposition. It does not, of course, come within the province of this Commission to deal with that question, but it is being dealt with by the proper authorities.

By Commissioner Burgess:

Q. What is the present price, Mr. Graff, approximately? A. Mr. Burgess, the present price is one which would have to be specified within certain limits. In other words, a price on a small lot, an offhand price, is one price. Another price is an inside price on a desirable contract. These prices at present range from 7 to 8 cents per pound. When a desirable contract is fought for, the price is forced down. I want to emphasize further the fact that with our large capacity, if we are not able to secure the good sized contracts we might just as well be out of business. We cannot, with our capacity, sell in retail, or in small lots to the ordinary small consumers in the eastern market, which, of course, is our sole market. If we are deprived of the larger contracts, of which there are only a very few in this country, say three or four or five, then we are out of the running, and it has been our experience during the past year that when we fought for those larger contracts, we were beaten, absolutely beaten.

By Commissioner Culbertson:

Q. You think that a 1½ cent increase in the tariff will enable you to get those contracts? A. Yes, sir.

Q. You will, I assume, increase your price by the amount of the tariff. That would be your idea, would it? A. Not necessarily, Mr. Culbertson. We think that approximately that increase is necessary, but, as we succeed in reducing our costs, we are simply going to aim for a fair profit, and I would not put it just that way. Our sole purpose, Mr. Chairman, is to secure a reasonable profit during this time of our growth, and when we have enlarged our plant and can manufacture the product at lower prices, the consumers will certainly get the benefit of it. But we cannot

proceed, failing to pay dividends, and borrowing money, etc., and keep up the fight any longer.

Q. I would like to have you answer that question, Mr. Graff. It is very vital. You are the chief producer of this product in the United States, are you not? A. I think we are.

Q. And in that position you would be able to take full advantage of any tariff levied on a competing foreign product, would you not? A. We hope to.

Q. As I understand it, you feel that your costs are so high now that you cannot sell and make a profit at the present prices? A. Yes, sir.

Q. Therefore you will have to increase your price, will you not, in order to make a profit? A. Yes, sir; we expect to increase the prices now prevailing.

Q. And the thing that will enable you to do that is the additional 1½ cents' protection that you are asking for? A. We think so.

Q. I would like to ask you a little concerning your company, the American Nitrogen Products Company. What are the physical assets of that company, in value? A. That, Mr. Culbertson, is given in the data furnished. We have shown all of that in the record.

Q. It is a matter of public information, is it not, so that you have no hesitancy in stating it now? A. We would prefer not to go into those figures in front of our competitors, if you please. The information is in the record, and——

Q. (Interposing.) I think it is fairly important that some of that information be brought out. You have a plant in Canada, have you not? A. Not now.

Q. Is that plant being scrapped? A. We had a plant there, and when the necessity for an increase on sodium nitrite duty became apparent, this plant in Canada, also manufacturing sodium nitrite, we were caught, as it were, between the devil and the deep sea. We had to choose between protecting our American plant by an increase in duty, and the scrapping of the Canadian plant, which, of course, was meant, because any duty increase would apply to Canada as well as all other foreign countries, and letting the then ½ cent per pound duty remain and taking

the chance on the competition from Europe. We chose the former.

By the Chairman:

Q. And the possibility of scrapping your American plant? A. It meant the destruction of the property of both plants. We chose the former, Mr. Chairman, deciding to place our sole reliance upon the American plant, and we show a loss of some $400,000 in scrapping the Canadian plant.

By Commissioner Culbertson:

Q. I understand, then, that you have no assets in Canada at all? A. No, sir.

Q. Not as a company? A. No, sir.

Q. To whom was that plant sold? What was done with the Canadian assets? A That, Mr. Culbertson, was handled with our Canadian creditors.

Q. I do not have any idea how large your American plant is, what the physical assets are, and it is a very vital question, it seems to me, in view of the fact that you are the only, or the major producer of this product, and the only producer of this product by the arc process. You ask that the duty be increased. The public is entitled to know how much physical assets there are asking for this protection. Do you see my point? A. Yes, sir. May I show a photograph of the plant without inserting it in the record?

Q. I think I have seen pictures of your plant.

By Commissioner Glassie:

Q. If this information Mr. Culbertson is asking about, which you do not seem inclined to give here, is in the record as a part of the work done by our investigators—— A. (Interposing.) Yes, sir.

Q. (Continuing:) Would you have the same objection to our making it public as a part of the facts in the case? A. Mr. Glassie, that is the very point; we were assured it would not be disclosed publicly.

Q. You regard, then, the statement of your capital assets as confidential, as well as the costs of production? A. Yes, sir; so far as the general public or our competitors are concerned, we feel that way about it.

Q. Are you not compelled, under the local State law, to make some report as to your capital assets, liabilities, etc.? A. Not our State, so far as I know.

By Commissioner Culbertson:

Q. What I want to know, Mr. Graff, is this: I want to develop this point. I want to know, either from you now, or subsequently, what the value of your Canadian plant was—I mean the physical value—and how much you got from it in the scrapping; what the value of your American physical assets is. Then, I would like to know—perhaps you will answer this now—how much of your capital value consists of patents and good will. You have a capitalization of this company, have you not? A. Yes, sir.

By Commissioner Culbertson:

Q. Could you give me the proportion of that capitalization which is represented by physical assets, and the proportion which is represented by patents and good will? A. That is all shown in detail in the record. We have given that very information, and it was verified by the Commission's experts in our offices.

By Commissioner Glassie:

Q. It is available already to the Commission? A. Yes, sir.

Q. But it is not available to the other parties interested in this hearing? A. We do not feel, in view of our circumstances and the conditions, that that should be submitted to our competitors.

By the Chairman:

Q. Mr. Graff, the important point is, is your plant an efficient plant? A. Absolutely.

Q. Can it produce sodium nitrite at a comparatively low cost? A. As compared with other domestic manufacturers, yes, sir; and it represents a very substantial investment. I have here a photograph showing the plant (exhibiting photograph). I will say this. The investment represents several hundreds of thousands of dollars. I will go that far.

By Commissioner Culbertson:

Q. I have here the balance sheet of your company for 1920, which purports to give the capital assets and the current assets and the deferred charges; also the capital stock, current liabilities, deferred liabilities, and the surplus. The total capital stock outstanding is $1,229,500. The common stock authorized and issued consists of $750,000; preferred stock, 7 per cent cumulative, authorized, $9,250,000, less unissued, $8,770,500——

Commissioner Glassie (interposing): May I ask if that is in the record?

Commissioner Culbertson: It is called "balance sheet and income expense statement, 1920, of the American Nitrogen Products Company."

The Witness: Excuse me, Mr. Chairman. We were assured that this matter would be treated confidentially.

By Commissioner Culbertson:

Q. This is not confidential. This is a public document. A. No, sir; absolutely not. It is for our own stockholders.

Q. I assumed that when a thing was published, it was distributed. A. That was simply our financial statement sent out to our stockholders; but the information is all there, and I will be glad to answer any and all questions the Commission may have with regard to the whole matter. There is nothing that we wish to hide in any manner, shape or form.

Q. I do not think that an ordinary balance sheet would be considered as confidential matter under the statute, so that I do not feel that there has been any violation. A. It discloses our profits, our losses, our operations, and the entire history.

Q. Nothing that I have said discloses that. A. Do not misunderstand me, please. I am perfectly willing to go into all these questions with the Commission, but, standing here as I do in front of our competitors, who are able to take advantage of anything and everything, we do not feel——

By Commissioner Glassie:

Q. (Interposing.) Am I clear in understanding that everything you have been asked about is in the record? A. Yes, sir.

Q. And was obtained by the investigators sent out by the Commission? A. Yes, sir.

Q. And that your sole point is, not that the Commission shall not have it, but that your competitors shall not have it? A. Absoluetly.

Q. Then, the question whether any of this should be made public would have to be dealt with by the Commission as whole, and they would have to pass upon it as to its confidential character and take the responsibility of making public such part as they did not regard as confidential?

Commissioner Culbertson: I may say that there came addressed to the Tariff Commission on Saturday a telegram, which I supposed would be here this morning. I do not have a copy of it here, and I cannot give the contents of it, except in a very general way. It was addressed to the Commission, and it was signed by the preferred stockholders of your company—at least someone speaking for them. It was——

The Witness (interposing): How many, Mr. Culbertson?

Commissioner Culbertson: I do not have it, and that is the difficulty.

The Chairman: Excuse me a minute. A telegram has been received. It is the intention of the Chairman to call that telegram to the attention of the Commission at an executive session. Until the Commission passes upon the telegram, and whether it is to be admitted into the record or not, I will rule that reference to it is not in order.

Commissioner Culbertson: I only want to say that this telegram stated that these parties wanted it read into the record at this hearing, and I do not think the full information can be adduced concerning this situation unless we have the information which was referred to in that telegram discussed here. I should think that Mr. Graff, above all others, would want that information before this hearing.

The Witness: Mr. Chairman, may I answer——

Commissioner Glassie (interposing): I suggest, Mr. Chairman, that the Commission go into executive session and consider this thing and see whether it is in or out, so

that we will all know exactly what the situation is. I have never seen the telegram and do not know anything about it. If it ought to be part of the record, then the Commission ought to deal with the question and direct it in, or order it out.

The Chairman: It is my intention to ask the Commission to go into executive session at the conclusion of this morning's hearing, and if we decide to put the telegram in the record, it could be so disposed of this afternoon.

Commissioner Culbertson: Mr. Graff may want to answer this telegram.

The Chairman: Mr. Graff will be here this afternoon.

The Witness: Mr. Chairman, I wish to answer it if it is in order, in executive session. I am satisfied I can answer it and explain it fully.

Commissioner Glassie: Normally, a mere telegram would not be evidence, I take it, anywhere. The identity of the party sending it would not be proved by the receipt of the telegram, and the question as to whether it is admissible or not would have to be passed upon by the Commission as a whole. I do not know anything about this telegram, but, as I understand it, there are two sources of information before the Commission. One is the information collected by its investigators. The other is the sworn statements of parties before the Commission, and this does not seem to fall within either one or the other. But if it is competent, then it ought to be known at an early stage, I submit, Mr. Chairman, so that we will know whether it is in or out.

The Chairman: I expect to adjourn the hearing temporarily and have the Commission pass upon that question. I should have brought it to the attention of the Commissioners prior to the opening of this hearing this morning, had all the Commissioners been available. As they were not, I decided to call it to their attention at an executive session of the Commission immediately at the conclusion of this morning's session.

The hearing will stand adjourned until 11:30, and the Commission will meet in executive session.

(Whereupon, at 11:00 o'clock a. m., the hearing was temporarily adjourned and the Commission met in execu-

tive session, at the conclusion of which the hearing was resumed, as follows:)

The Chairman: Is it agreeable to all parties interested in these proceedings that the hearing continue at this time? The full time for adjournment has not elapsed. We will continue or we will wait until 11:30. If there is no objection, the hearing will now be resumed, and the Commission will report that it has considered the question in executive session in regard to the competency of the telegram that has been sent to the Commission, and it has decided that the telegram is not of the character of evidence and is not admitted in the record. Mr. Graff, you may proceed.

Commissioner Culbertson: I would like to ask a question or two.

By Mr. Culbertson:

Q. Mr. Graff, do you know a man by the name of Christian Tjosevoig? A. Yes, sir, I do.

Q. Who is he? A. He is a man who was a stockholder but who is not now a stockholder of record, who is dissatisfied because of the fact that the company has not paid its dividends.

Q. What did he do with his stock? A. He disposed of it.

Q. Did you buy it? A. No, sir.

Q. Did anyone connected with the company? A. No. I think he set it over to certain other parties in order to escape judgments against him.

Q. Do you know of the preferred stockholders of your company having a committee of any kind? A. I do not; no authorized committee to act in such matters at all.

Q. Have they taken any action with reference to their alleged interest in your company? A. They endeavored to bring trouble for us. This man, I mean, endeavored to bring trouble for us, yes, sir.

Q. Have they started any legal proceedings of any kind? A. Mr. Chairman, how far should I answer questions of this nature in regard to this matter?

The Chairman: I think the questions so far are proper and throw some light on the situation that your company is in, and the Commission will be glad to have you be as

frank in your replies as you think that your own interests will permit you to be.

Mr. De Vries: In this connection, may I suggest, Mr. Chairman, that all that is contained in the copy of the petition which we received is the following allegation:

"That the profit assumed above the one-half cent per pound equals $24 per ton, which, on one hundred tons monthly production is $2400 or $28,000 per year. Our outstanding capital stock, fully paid up, is $1,229,500. The above profit is therefore merely nominal and would be entirely inadequate for a dividend."

It seems to me it is very pertinent to inquire just exactly what of this capital stock was paid by the company and what it represents, and what the assets are behind it; whether it is worth one cent on the dollar or a hundred cents on the dollar.

The Chairman: You will have an opportunity to question the witness.

Mr. De Vries: I just wanted to supplement Mr. Culbertson's inquiry, as to the pertinence of it.

Commissioner Glassie: You were reading from the petition of the applicant, were you?

Mr. De Vries: Yes, sir.

Commissioner Culbertson: Which is not public property, of course?

Mr. De Vries: That is the limited portion of it, which we were furnished.

Commissioner Culbertson: Now, Mr. Graff, will you answer my question, please?

The Witness: Yes, sir, I will be very glad to answer you. Tjosevoig, as I said, was dissatisfied, and interested another man by the name of Newhall, who is a chemist and a former employee of ours, and began to make trouble for the company, the purpose of which was to wrest control and secure it, presumably, for themselves, in some manner, shape or form.

By Commissioner Burgess:

Q. That was before he disposed of his stock interest? A. Afterwards.

Q. After? A. Yes, sir. I may say that he disposed of his stock interests to some of his relatives for one thing; simply set it over in order to escape judgments; so that he could not be gotten at, and when the company failed to pay its dividends, on account of its struggles, they began this trouble, and there was no way that they could very well do it except through our creditors. They scouted around amongst our creditors and tried to get an action started for receiver. In fact, they did succeed in having an action started for a receiver.

By Commissioner Culbertson:

Q. In what courts? A. The Superior Court of King County, Washington. That action was dismissed after a full hearing, and stands dismissed.

Q. There was a petition filed in that case, wasn't there? A. Yes, sir. It was a fraudulent petition. They had no authority, and when that was shown to the court, it fell.

Q. Do you have the petition before you? A. I did not know that this was going to come up in this manner, but I have a little newspaper clipping that corroborates my statement.

Q. What I should like to have put in, if possible, as an exhibit, is the petition in that case, or at least a statement of the facts alleged by these alleged preferred stockholders. I of course know nothing about this. I simply want to know what the financial background of your company is. A. Well, I do not have that. Furthermore, I would naturally object to that going into a public record.

The Chairman: If part of the court record goes in, I should think the whole thing would have to go in.

Commissioner Culbertson: That is a public record of course—that petition.

The Witness: The matter has been dismissed.

Commissioner Culbertson: Well, that can go in as a fact too. I am not raising it as anything except an allegation of facts.

By Mr. De Vries:

Q. Mr. Graff, there were two petitions? There was an intervening petition in that proceeding, was there not?

There was a creditor's petition and also a preferred stockholders' petition? A. Yes, sir.

Q. Now, the creditors' petition you say has been dismissed? A. Yes, sir.

Q. Has the preferred stockholders' petition been dismissed? A. I think that is still pending.

By Commissioner Culbertson:

Q. Now may I ask, in that preferred stockholders' petition, whether there is any reference to the British Columbia plant? A. Well I think there is, reciting the fact that the plant is in danger, or not being able to operate and so forth.

Q. That plant is located at Lake Bunson, is it? A. Yes, sir.

Q. British Columbia? A. Yes, sir.

Q. Do these alleged preferred stockholders have any property rights in that British Columbia plant now? Did they take it over? A. No, sir. The plant was disposed of by the directors.

Q. Well, what are the allegations of these preferred stockholders in this petition then, with reference to this British Columbia plant? A. Well, as I remember it, the allegations were that the plant was not profitable, could not operate profitably, and that there was no chance of paying dividends and so forth.

Q. Well, if it is not in existence, how could that allegation be made? A. Oh this was prior to the time that it was sold, Mr. Culbertson. You understand, this took place several months ago, and the company did the only thing it could do under the circumstances. I have explained fully to the Commission our difficulties out there, before—financial difficulties, in edeavoring to continue in the face of this competition, and that is one of them, but we still have our American plant and we are doing the best we can.

Q. Well, the information has come to me, and I think it is an important thing for you to bring out in your testimony, that this Lake Bunson plant is still possible of operation, and at least that it could be operated, and if operated efficiently would produce substantial product at a reasonable price. Your statement is that it is entirely scrapped. Now, those two ideas—I do not know which is correct—are of course inconsistent with each other and I think you ought to clear that point up. A. Mr. Culbert-

son, may I ask who has made those statements? Is that statement made in that telegram by those two parties?

Q. It has come to me from parties who claim to represent the preferred stockholders. A. Well that statement is absolutely untrue. The company does not own the plant at all. As I informed you before, the plant has been disposed of to our Canadian creditors and the matter is closed absolutely.

By the Chairman:

Q. Is the plant still intact or has it been scrapped? A. No, sir. It has been dismantled. It has been disposed of absolutely. The company has nothing to do with it and when they make that statement to you they are stating something they do not know anything about or else deliberately misstating.

By Commissioner Culbertson:

Q. May I ask whether this balance sheet which your company prints, which you say is confidential, is distributed to all stockholders? A. It was. They have not been printed in that form for a year or two.

Q. Would these gentlemen that you have mentioned, Mr. Newhall and Tjoseveig have copies of these? A. Well I really do not know.

Q. Do you know whether these facts were recited in the preferred stockholders' petition which they filed in King County? A. Which is that?

Q. The facts that are in these balance sheets, of the amount of capital stock and current liabilties and so forth. A. Why I think very likely it was referred to. As I remember it, it was.

Q. That they are public property? A. In a general way they might have been referred to there. I do not know that they went into it in detail.

Q. I feel it is very difficult for us to get any idea of the problem concerning your company without a rather frank discussion of the facts in this balance sheet. Of course, I shall not urge you to discuss them if you regard them as confidential. A. I will be very glad to discuss it with the Commission in executive session.

Commissioner Culberston: Well that is not the place where that sort of thing should be discussed.

Commissioner Glassie: You would not be present at an executive session. It would cease to be executive.

By Commissioner Culbertson:

Q. Have there been any attempts to sell stock of your company throughout the United States to the general public? A. Well several years ago when we built our plant.

Q. Who was the promoter of the enterprise? A. Principally Seattle men.

Q. Of course, the costs not being in the record, it is a little difficult to discuss the question of efficiency, but I would like to have this opinion from you: Suppose the tariff duty is increased one and one-half cents per pound on sodium nitrite, do you believe that then, with your present equipment and methods of production, you can compete with the foreign product successfully in the Eastern markets? A. Yes, sir.

Q. What is your output per horsepower year? That is the basis on which you figure your output, is it not? A. No, sir. It is figured per kilowatt year, more properly.

Q. Per kilowatt year? A. Yes, sir. That production is approximately the same as the Norwegian. It is about the same yield.

Q. You have the same yield as the Norwegian? A. Yes, sir.

Q. Is that fact confidential in the record—your yield? A. Well, certainly I would say so, except in a general way.

Q. I do not want to ask you anything that is strictly confidential. You expect however to improve the efficiency of this plant as you go along, do you not? A. Oh yes.

Q. In other words, the arc process is a more or less new development, is it not? A. Yes.

Q. In this country? A. In this country, yes, sir.

Q. They have had a long experience with it in Norway? A. Yes, sir.

Q. How many years? A. Since 1903; about that time.

Q. Is it a logical development in the application of the arc process, to produce products other than sodium nitrite? I mean as this arc process, in its application, becomes more and more efficient, sodium nitrite tends to become a by-product, and other products are produced in connection with it? Is that correct? A. Oh yes. As I stated this morning, with a large plant you would make other products primarily,

such as fertilizer; acid and fertilizer, and you would secure nitrite as a by or end product.

Q. What other processes are employed in the United States for making sodium nitrite? A. The processes I referred to this morning, which is called the lead process. That was the old process; there is also the ammonia process.

Q. In those cases is sodium nitrite a by-product or a joint product or a product by itself? A. Well it depends on how you look at it. I would say that with the ammonia process the people who are making sodium nitrite make dozens of other products as well, and it is not a by-product in the sense that it is in Norway, yet it is not a major product in the sense that it is with us. The same with the lead.

By Commissioner Burgess:

Q. More of a joint product then? A. Yes, sir.

By Commissioner Culbertson:

Q. That is what I was trying to get at. It is a joint product? Or, is it a joint product? A. Well as I say, Mr. Culbertson, it is pretty hard to define, unless I have a definition before me as to just exactly what you mean by "by-product." But, concerns make a lot of other products and nitrite is only one of many commodities that they manufacture.

Q. This of course is a vital problem you see and in the comparison of costs of production, it is a point upon which we must look to the man in the business for illuminating information, and when we come to compare the costs of production of sodium nitrite in your plant, which is the only product that you manufacture, with the cost of production of a by-product in Norway and with the cost of production of sodium nitrite as a joint product in other American plants, we need some information to guide us in making that comparison? A. Yes, sir. At the same time, the Tariff Act does not refer to that question at all.

Q. Well, I know the Act. What I want is information and not argument on this particular point. Perhaps you can submit something subsequently on that point. Let me ask you about your possible program in the development of your plant. You have suggested that you might develop your project in the West to such a point that you

would be able to make sodium nitrite as a by-product? A. We hope to, yes, sir.

Q. In the same way that it is done in Norway? A. Yes, sir.

Q. You have been in operation for about six years? A. Yes, sir.

Q. How much capital will be necessary to develop a plant such as they have in Norway, which would enable you to produce sodium nitrite as a by-product? A. We would not have to employ the capital that they have in Norway in order to do that. As I stated this morning, they have over $50,000,000 employed. It is not necessary to employ any such large capital as that in order to do it.

Q. Now, that is not an obvious thing to me, because ordinarily, costs of construction and costs of water power are higher in the United States than they are in Norway. How could you do that more cheaply? A. I think in the Pacific Northwest we have fairly comparable water power conditions. We think such a plant would be a success out there.

Q. But that does not explain why it would be cheaper for you to build a plant in the Pacific Northwest, than it would be to build a similar plant in Norway. A. Well, Mr. Culbertson, we are an American company, and we naturally would build our plant in this country. We are not proposing to build a plant in Norway.

Q. Well do you know the investment of capital in Norway, per unit of product? A. Only approximately.

Q. Could you give us an estimate of it? The investment of physical capital, per unit of product? A. Well, I would have to look that up.

Q. I should like to have that information in the record. I should like also to have your estimate of the amount of capital per unit of product—a parallel comparison. A. Which products?

Q. Well, we are talking about sodium nitrite now—but your program is to develop some kind of a plant—the same kind that they have in Norway. Make your comparison analogous all down the line. How much capital investment would you have to have in this country, per unit of product, whichever product you take, to reproduce

the same kind of a plant that they have in Norway? A. Well, it would be approximately the same.

Q. It would? A. Yes, sir.

Q. You think you could get water power to run a plant of that kind at approximately the same price that they get it in Norway? A. I think their price of power in Norway—the actual power, will be lower than our price because of the fact that they have already built and written off a large proportion of the entire cost of their plant and it is largely a matter of bookkeeping. I don't know what they would call the price of their power. It would be very low, but we do have a very low power proposition, which would justify a plant of this kind and make a success of it.

By the Chairman:

Q. Well, Mr. Graff, would not their cost of production of a plant be lower than yours, buildings, equipment and so forth necessary? A. In this country than in Norway?

Q. Would not the Norwegian costs of construction of their plant and equipment of the plant be lower than yours? A. I don't think so. I think conditions now are such that the prices in Norway are very high. Furthermore, the best power in Norway has already been developed. I do not think that any further expansion of the nitrite industry in Norway will be had. There has not been any expansion in Norway for several years.

Q. But if you were contemplating the expansion of your plant in order to go into the nitrate and fertilizer business, do you think you could put up a plant and equip it as cheaply as that plant could be put up and equipped in Norway at the present time? A. Well, I would say approximately so, yes, as far as actual cost of construction is concerned. That is, as far as nitrate factories are concerned; and as far as the actual cost of the power is concerned, I do not think that any plant in this country would compare with the power costs in Norway. No.

By Commissioner Culbertson:

Q. Do you think that the arc process can produce nitrogenous products, taking the whole range of them, as cheaply as the Haber process? A. The arc process will be the cheapest process of all for making nitric acid.

Q. Has that been demonstrated? A. Yes, sir.

Q. Is the Haber process used in Norway at all? A. No. It is used in Germany, but the British Government went into that question very fully and I have a report with me which shows the comparison of the costs of manufacturing nitric acid by the various processes, and there is an official statement there to the effect that of all the processes, the arc is the most efficient.

Q. What processes did the American Government experiment with? A. They have experimented with both the ammonia process and the cyanamid process. They have a cyanamid plant at Muscle Shoals of quite large capacity. They had an ammonia plant there which failed of successful operation; but another private company has since put in a plant and improved upon the design of this company, which I believe is a success.

Q. In planning a large project of this kind with a view to producing a series of nitrogenous products, I presume you have looked into the possibility of fertilizer made by your process, in competition with the Chilean natural nitrate? A. Yes, sir.

Q. Do you think that fertilizer made by your process can successfully compete with fertilizer made from the natural nitrate from Chile? A. We know it absolutely.

Q. Has it been demonstrated? A. It has not been demonstrated in this country, because it is not made here yet, but it has been demonstrated in Norway.

Q. Do you know what percentage of the world consumption of nitrogenous fertilizer comes from nitrogen fixation plants and what per cent comes from natural deposits in Chile?

Commissioner Glassie: You are speaking of the whole world market?

Commissioner Culbertson: Yes, of the whole world market.

The Witness: It will be several per cent.

By Commissioner Culbertson:

Q. It is negligible up to the present time, I presume? A. No, sir, I certainly would not say it was negligible.

Q. Well, you say "several per cent". A. Well, it must be remembered that in Chile they export something like

two to three million tons per annum, and 5 per cent of that would be approximately 150,000 tons per annum, and it is growing. Fertilizer made from the air process is growing very rapidly, whereas some years ago the per cent of the total world's consumption of Chile nitrate was only fractional—less than one per cent. Now, it has grown to several per cent. I think altogether at the present time it amounts to possibly ten or fifteen per cent.

Q. Having looked into it, I presume you realize that the Chilean product can, under competition, be sold for a much lower price than it is sold at now? A. Yes, sir, we have looked into that.

Q. There is an export duty levied by the Chilean Government of approximately 56 per cent of the nitrate value? A. $11 per ton.

Q. And that export tax, of course, could be reduced substantially, which would lower the price to the foreign consumer. I presume you also know of the arrangement through the Chilean nitrate committee, whereby the high cost producers in Chile are kept in the market, along with the low cost producers, so that if there was a reorganization along that line there would be a lowering of the cost to the foreign consumer of nitrogen or sodium nitrate? A. Yes, sir.

By the Chairman:

Q. As those prices declined, the flexible tariff would enable you to petition for increases to meet them, would it not? A. I do not quite understand that.

Q. As these prices of Chilean nitrates decline, and your competition from that source increases, the provisions of the flexible tariff would be available to you for petitions for increases in your duty to meet the situation? A. It would, in so far as sodium nitrite is concerned. It would not, in so far as sodium nitrate is concerned, because the nitrate comes in free.

Q. Well, if there is danger of severer competition, the way to meet it is by increasing the duty, if the country decides to maintain the nitrate industry? A. If that competition became severe, yes, I think that the country would slap on a duty; but the important thing here is that in establishing such a plant as we have in mind we will be

a factor in the future, in bringing down the costs of Chilean nitrates, which are considered too high. That is the very thing that Mr. Hoover, our Secretary of Commerce, is now working on. There will be a report submitted to this coming Congress on that very question.

Q. You look forward to a reduction in your costs of production, and a decrease in the price that you must charge for your product? A. I did not understand that.

Q. I say you look forward to a reduction in the costs of production in your product and a decrease in the price at which you will sell it? A. Yes, sir.

Q. Is your market chiefly in the Eastern States? A. On sodium nitrite it is exclusively in the Eastern States.

Q. Have you advantages in production that offset the additional transportation charges? A. Yes, sir. Our low cost of power. We have a power cost which is far less than any power cost which could possibly be secured in this part of the country, and that offsets the costs of transportation, so that we consider we have the most economic and efficient location right where we are.

Q. Have you any further testimony to offer, Mr. Graff?

Commissioner Glassie: I would like to ask him a few questions.

Commissioner Culbertson: Before I leave my statement, I ask you to consider, Mr. Graff, rather seriously, the wisdom of putting in these balance statements, even in spite of the fact that you regard them as confidential.

By Commissioner Glassie:

Q. Mr. Graff, I would like to ask you a few questions. If I do ask you anything that calls for an answer, which in your judgment, would involve a disclosure not contemplated by law, you can simply say so. Your company is organized I take it in Washington? A. In the State of Washington.

Q. You are required of course, to make annual reports to the State, are you not, as a corporation of the State? A. We are required to make annual returns to the United States Government, and file our articles of incorporation and so forth, with the State, but I do not believe that we are making annual returns to the State. That is to the best of my recollection.

Q. Have you any objection to stating whether the whole par of your preferred stock issue was paid for in money?

A. No, I have no objection to that.

Q. It was paid for? A. All of it was paid dollar for dollar.

Q. In money? A. Yes, sir.

Q. At par? A. At par; a hundred dollars a share.

Q. And out of your total authorized issue of eight millions, you issued something like a million? A. We have a ten million dollars authorized issue, and there was $1,250,000 outstanding, of which three-quarters of a million is common and the balance is preferred.

Q. How much is common? A. $750,000; the preferred, something less than a half a million; all of which was paid dollar for dollar.

Q. Including the common? A. No, sir. I mean the preferred.

Q. And of the capital subscribed and paid through preferred stock, did it all go into the installation of this American plant? A. No, sir.

Q. Did part of it go into the Canadian plant? A. Both plants.

Q. About the same time? A. Well we built the American plant in 1917 and we started building the Canadian plant in 1918.

Q. Did the Canadian plant operate in the manufacture of sodium nitrite? A. Yes, sir.

Q. How long? A. It operated making sodium nitrite for approximately a year and a half, until the competition became such that we were up against the tariff question and we had to desist.

Q. Now, during the year and a half that the Canadian plant operated, was the product of the Canadian plant marketed in Canada or in the United States? A. Exclusively in the United States.

Q. Exclusively? A. Yes, sir. There is practically no market in Canada.

Q. Substantially the same market that you were supplying from the American plant? A. Absolutely the same. We supplied practically all of the large dye manufacturers in the New England States. We had contracts and we sold to all of them, of any size.

Q. You supplied them from both your plants during the period, of course, that both were running? A. Yes, sir.

Q. Now did you begin the manufacture of sodium nitrite immediately after the American plant was in condition to manufacture? A. Oh, that was what it was designed for.

Q. You did not manufacture anything else? A. No, sir; never have.

Q. You manufactured nothing else in the Canadian plant? A. Yes. In the Canadian plant we made some nitric acid. When we stopped making nitric we endeavored to manufacture acid, by changing over the plant, but it proved unsatisfactory.

Q. But during the time that you were in full production of sodium nitrite in the Canadian plant, you manufactured nothing else? A. Nothing else, but nitrite at that time, no, sir.

Q. Now, have your costs of production dimininshed or increased within the two years? A. Well, I wish to say that our plant was closed on April 1st, 1921.

Q. You mean the American plant now? A. Yes, sir, because of this stagnation of the market. We could not operate, and we shut down.

Q. How long did you remain closed down? A. It remained closed down until last fall. It did not really begin to again operate until January 1st last.

Q. 1923? A. Yes, sir.

Q. Taking the period prior to April 1, 1921 and your period subsequent to January, 1923, which shows the larger unit cost? A. Prior to April 1, 1921, shows the higher cost. We have a lower cost now than we did then.

Q. Has your labor cost increased or diminished in the second period as compared with the first period? A. It has diminished.

Q. Has your power cost remained constant? A. Yes, sir.

Q. That is, what you pay for a given unit of power has remained constant? A. Yes, sir.

Q. Do you mind stating whether or not your contracts for power or your license or easement or whatever it is under which you get your power, is permanent—perpetual? A. Oh, it is not. I do not think any power in this country is permanent.

Q. You have no interest in the source of the power? A. No, sir.

Q. Is it supplied by a company which is subject to the public utility law of the State, and therefore bound to give you power at a reasonable rate, or is it purely a private contract? A. Well, we obtain power frrom two or three different sources. We are able to draw power from more than one source, and the development of power out there is such that we fell reasonably certain as to a power supply in the future. In fact, our supply in the future will be better than it has been in the past.

Q. Do you have contracts for it, or do you have contracts which are adjustable from time to time by public authority? A. No. We have certain contract arrangements.

Q. They run over what period? From year to year? A. Well, it is a little difficult to explain just how we operate.

Q. Well in a general way I want to know what your relation to the power is. A. Well in a general sense, we feel secure on that point, and our future conditions will be better than they have been in the past.

Q. I think you said that you supplied the greater part of the domestic product? Is that correct? A. We think we are the largest domestic manufacturers. We do not know exactly what the other manufacturers turn out but we have reason to think that we are the largest.

Q. How many other American manufacturers are there beside yourself? A. There are two or three.

Q. Has any one of them joined with your company in this application, or in support of it? A. We have had nothing to do with them. They have certainly not joined with us because our application is individual.

Q. I think you stated in answer to some questions put by someone else, the total American demand for the sodium nitrite—the average annual demand. I will ask you during the period of your suspension, if you happen to know how that was met? A. That was met by importations.

Q. It was not met by increased production in the other American plants? A. Oh, no. In fact, the importations from Europe were such that the stocks accumulated, and prices went down, and there was absolutely no incentive for anyone to operate in this country. We had to await the depletion of the stocks and await tariff action and one thing or another before there was any cause for continuing.

Q. Is it the practice of your trade to make up quotations of prices on sodium nitrite so that manufacturers may know from period to period what the current prices are? A. No, sir. We quote in each particular case. We quote according to the requirements and conditions at that time.

Q. The requirements and conditions and terms? A. Yes, sir.

Q. In which of course, time and quantity are important elements, I suppose? A. Yes, sir.

Q. Is there any way in which a person thinking of embarking in this business, or called upon to consider it, can find fairly accurate information with respect to prices at which sales are being made? A. Oh yes, that is very easily obtainable in the technical journals in their quotation lists.

Q. What is the source of their information? A. The source of their information is presumably from the various brokers and people who sell nitrite around New York City. They have never asked us for direct information, but they presumably get it from sales that are being made and quotations that are being made by various brokers.

Q. Then in spite of the fact that you quote your prices according to the conditions of the particular contract, there is such a thing as prevailing price of sodium nitrite from period to period? A. Oh I think so, in a general way.

Q. Well what is it now? A. It is now, according to the journals, 7¼ and 7½ cents per pound, which are merely general prices.

Q. In other words, it circulates about 7¼ to 7½ cents per pound. A. Yes, sir.

Q. Has the average market price increased or decreased since January 1, 1923? A. It has decreased. I might say that at this time, or prior to that time the price on domestic nitrite was from 9 to 10 cents per pound and it was only forced below that figure because of foreign competition.

Q. Then the domestic nitrite, in the period prior to January 1, 1923, averaged what? A. From nine to ten cents. That is what it was being quoted at in the journals and on the market.

Q. Now, who handle the importations of sodium nitrite in the American market? A. From the foreign countries?

Q. Yes. A. It is brought in by either the agents of the German manufacturers, Badishche Company or by the rep-

resentatives of the Norwegian company or the Swiss manufacturers.

Q. Well, taking the Norwegian company for instance, as far as you know, do they sell directly to the dye manufacturers through their own exclusive agents, or do they sell through brokers? A. At the present time they have their own exclusive agent or company in New York City, called the Norwegian Nitrogen Products Company.

Q. That is the selling company for the Nosk Hydro Company? A. Yes, sir.

Q. And is the same true of the Badische Company and the Soda Fabrik? A. Yes, sir. They are represented by Korttoff-Peckhardt Company.

Q. What is the custom of the trade with respect to mode of competition between the American producer and the importer of the foreign article? How do you meet any competition, as to mode? How is it carried on? A. Well I might illustrate it this way: For instance last spring, about February 1st we learned from our New York agents that the Du Pont Company was in the market for their future requirements, said to be some fifty to seventy-five tons per month, and we were invited to make a quotation. The importers were also invited to make a quotation. This was a good, substantial tonnage, desirable business. In fact, very desirable. We had been looking forward to it for about a year previous to that time; and we made a quotation. We were informed by the Du Pont Company that our price, which was as low as we could possibly make, was absolutely out of the question; that they could buy the foreign material at a considerably less price.

Q. But you were not informed what that price was, of course? A. Yes, sir. I have submitted that to the Tariff Commission in confidence.

Q. Well, what your price was?

Mr. De Vries: We have no objection to his quoting the prices.

The Witness: We have submitted both prices in the data.

By Commissioner Glassie:

Q. The price you bid and the price you were told the importer bid? A. Yes, sir, and the price at which it was finally contracted was far below any figure that we could

make, and was far below any price at which they were selling in other countries.

Mr. De Vries: Mr. Chairman, as representative of the company that obtained that bid, we have no objection to stating what it is.

The Chairman: Well you will have your opportunity to state it if you want to do so.

Mr. De Vries: I wanted to offer him this opportunity.

Commissioner Glassie: You may ask him for it if you like, if he knows. I cannot take advantage of your waivers.

By Commissioner Burgess:

Q. Looking at it in another way, have you any objection to stating how much you were under-bid? A. Well, we were under-bid so much that they took on the contract below our costs.

Q. Would that amount to more than a cent and a half a pound? Were you under-bid more than one and one-half cents per pound? A. The actual under-bidding was less than one and one-half cents per pound.

Q. Approximately a cent and a half? A. For the reason that in order to take on that contract we made—I have also explained this to the Tariff Commission—we made a figure which was irrespective of our cost, before we let go; and that was the case in one or two other instances, where we have been forced to take on—it would cost us more to discontinue manufacturing than to carry on until we could get relief. We have taken certain contracts and sold nitrite at below cost.

Q. You mean that irrespective of cost, it was below your cost? A. Yes, sir, our quotation was below our cost.

Q. So that in answer to Mr. Culbertson's question a while ago you would have to add, if you received a cent and a half, the full cent and one-half to your then quoted price? A. Yes, sir. We should have the full cent and a half to enable us to operate at a profit. The relief, to be adequate, will have to be in the full amount asked for.

By Commissioner Culbertson:

Q. I do not want to interfere with any line of questioning, but could you put in the record approximately the annual consumption of sodium nitrite in the United States?

A. As I stated this morning, I would estimate from three to five thousand tons per annum, but I think your own experts have possibly even better data on that in the record than we have.

By Commissioner Burgess:

Q. Now right following that thought, you stated that it would not be necessary to add the full cent and a half per pound, provided it was given additional protection. For what reason would it not be necessary? A. Mr. Commissioner, I do not know that you clearly understand me. I say it will be necessary to add the full cent and a half per pound, in order for us to operate at a profit, but in that particular case you asked whether or not the difference in the two quotations was greater than a cent and a half, and I said it was less, because we kept our price down, and named a figure that would not enable us to operate at a profit, in order to get the business and be able to conduct our plant rather than to close.

Q. But your answers do not seem to be consistent. Answering Mr. Culbertson you said it would not be necessary to add the full cent and a half, and you had some reason for saying that. I presume it was on account of being able to secure these large contracts rather than the smaller contracts. In the other case, just now, you said that you would have to add the full cent and a half. A. I do not remember making a statement to the effect that it would not be necessary to add the cent and a half. What I think was stated this morning was that in the future, as our costs decreased, it would not be necessary; but under present conditions, and until our plant is enlarged and until our operations enable the costs to come down, why, it will be necessary.

By Commissioner Glassie:

Q. Resuming, I understood you to say that you had learned or discovered that the foreign importers were under-valuing sodium nitrite. Am I correct? A. I beg your pardon?

Q. I understood you to say that importers of sodium nitrite were discovered to be under-valuing. Did you make that remark? A. Were under-valued?

Q. Were under-valuing their importation; putting it below the foreign selling cost? A. Well, I said that——

Q. (Interposing.) Well, what was the fact about it? A. I said that they had been selling in this country at lesser prices than in their own countries.

Q. What is your source of information? A. We have various sources, and the source has been so considered by the Treasury Department that they have issued the orders that I referred to.

Q. Well, exactly what did you discover? What I want to get at is, I think I heard you make that remark as I came in, and I did not grasp it. What did you find? What information did you get? A. Well, for instance, the du Pont contract was taken on at 4¼ cents delivered at Philadelphia, plus duty, which makes 7¼ cents. That is, their net price was 4¼ cents delivered at Philadelphia. At that same time the London price on sodium nitrite was around 5½ cents, as against 4¼ cents; showing a very heavy reduction made for that sale to this country, in order to secure the business and overcome the duty of 3 cents per pound.

Q. You brought those facts to the attention of the Treasury Department? A. I did.

Q. Where did you get the London quotations? A. We got that through various channels. We got it from technical journal quotations. We also had it from private quotations; private bidding.

Q. Well, have you any information in regard to foreign prices that you think ought to be submitted to the Commission, which has not already been submitted? A. We have submitted all of that in our data. We went into that whole question also. Although we did not think it was really within the province of this Commission, yet we gave it as a side-light on the whole issue; gave these very facts in our data. Of course, we submitted very complete information on it to the Treasury Department.

By Commissioner Culbertson:

Q. You should put in the record the citations of those Treasury decisions.

By Commissioner Burgess:

Q. Has the Treasury Department decision been rendered yet? There has been no decision, has there? A. Yes, sir, that is, there has been an order issued.

Q. But no decision rendered in the case, whether it was under-valued, was there?

By Mr. De Vries:

Q. What order has been issued? A. There has been an order issued to withhold appraisement.

Q. By whom was it issued, and when? A. By the Treasury Department.

Q. What date? A. August 20th.

Q. Is it in effect now? A It is.

Q. Have any appraisements been withheld? A. There will be if there is anything coming in. I don't think you have had anything the last few weeks.

Q. Well, we have experienced no order of that kind as yet, and we have been getting shipments nearly every day. A. Well, I will put it in the record.

By Commissioner Glassie:

Q. Can you give us reference to any order? A. Mr. Chairman, I wish to submit for the record this official letter of the Treasury Department, Division of Customs.

Q. I understand you to say that in conformity with some request made by you, the appraisements had been suspended? Is that what you stated? A. The appraisements of entries are withheld.

Q. Well, changing "suspended" to "withheld", then my question states what you stated before, correctly, does it? A. Yes, sir.

The Chairman: Will you read the letter, please? A. (Reading:)

"Treasury Department, Office of the Secretary,
Washington.

"August 20, 1923.

"American Nitrogen Products Company,
"Securities Building,
"Seattle, Washington.

"GENTLEMEN:

"Referring to your letters of the 31st ultimo and 9th instant and previous correspondence, relative to the suspected dumping of sodium nitrite, I reply that the appraisers at Boston, New York, Philadelphia and Baltimore have been requested to withhold appraisement reports on importations of this article pending the results of an investigation now in progress and further instruction based thereon. You will be informed as promptly as possible of the conclusions reached.

"Respectfully,

"J. D. NEVINS,
"*Acting Director of Customs.*"

By Mr. De Vries:

Q. What is the date of that? A. August 20th.

By Commissioner Glassie:

Q. To what extent, if at all, is this price of 5½ cents in London indicative of the average London price? A. The price we secure as the London price?

Q. Yes. As the London price at the time of this underbidding you are referring to. Was that the average London price, taken by the year? A. I think it would be if you take the London price as made at that time and as quoted in the journals, and compare them with the quotations as made in the journals in this country. That is, taking them on the same basis, it showed that that sale was made in violation of the anti-dumping act; that there was a decided reduction in price for that particular product. That holds true with respect to other sales that have been made. So, to be fair about the matter I have compared the quotations as made in the journals in that coun-

try and the quotations in the journals in this country, or I would compare the inside prices as shown by their data in that country as against this country, and it shows a violation.

By Commissioner Burgess:

Q. What is the quoted price in this country, or what was it when the du Pont people made their contract? In other words, the open market price? A. The open market price in this country at that time was between eight and nine cents per pound; it went to 7¼.

Commissioner Glassie: That is all the questions I have to ask.

By the Chairman:

Q. Have you any further testimony to offer, Mr. Graff? A. I will just make a brief concluding statement, Mr. Chairman. We consider that the industry we represent is entitled to the fullest consideration by this Commission. It is an industry of national importance. The Government in undertaking to establish this business has spent $105,000,000 at Muscle Shoals, endeavoring to establish a nitrate plant. Congress is now engaged with Mr. Henry Ford, proposing to grant him enormous concessions in order to carry on that same business. Our Secretary of Commerce, Mr. Hoover, is now engaged in extensive investigation and research for the purpose of encouraging this industry in this country. If it is encouraged and established, it will result, without doubt, in a reduction of the price of fertilizer and nitrates hitherto imported from Chile, of such huge proportions that in the year 1920 approximately two and three-quarter millions metric tons were shipped throughout the world, valued at $300,000,000, one-half of which came to this country and for which this country paid to the Chilean Government an export tax of $18,750,000. The establishment of the industry in this country means a reduction of the cost of fertilizer to the farmers.

We have begun in a modest way and we have had our struggles, of which we are not ashamed, to get the business going. We have the only electric arc plant operating in

the country. We have succeeded in developing the process until it is sufficient. We are the largest producers of the commodity. The quality is absolutely unquestioned. It compares absolutely with the Norwegian product, of which we have also submitted proof.

These are sidelights on the question. What we ask is relief under the law which says that the differences in the costs of production in this country and abroad shall be equalized; and that in considering the differences in the cost of production, the Commission is to take into consideration, under Section 315-C, the differences in the conditions of production, including wages, materials and other items of cost of production of such similar articles in the United States and other competing countries. Also take into consideration differences in the wholesale selling price of the different commodities in the different markets in the United States, which we have shown was one and one-half cents or more last fall when our relief was asked for. Also take into consideration advantages granted to the principal markets of the United States and advantages granted to foreign producers by foreign governments. Of course, that does not apply.

But also to take into consideration any other advantages or disadvantages in competition, under which would come the manufacture over there as a by-product, freight rates and so forth.

I want to emphasize the fact that the foreign manufacturers can sell nitrite, if necessary, as nitrate. They will sell what they can as nitrite. What they cannot sell as nitrite they will transpose into nitrate and can sell the nitrite, in case of emergency, at the same prices at which they sell nitrate, and those prices at the present time are 2.7 cents in New York City; from 2.65 to 2.7 cents. Those are the prices at which they are quoting nitrate in the New York market. I say, in case of absolute necessity, they could go to that same figure in the case of nitrite. So that it can be readily seen that the full amount of relief asked for is necessary. Of course, if they undertook to do that they would be violating the Anti-Dumping law and we have sought action there and are getting relief.

I think that is all, Mr. Chairman, except that I would respectfully request that you act on this matter as quickly

as possible. We have been waiting now since October 24th last; we have gone all through the stages required by the Commission. The Commission has ascertained the foreign costs and I have come 3,000 miles to attend this hearing and I have nothing to do except to walk the streets until the matter is decided.

The Chairman: Are there any questions, Mr. De Vries, which you contemplate asking the witness?

Mr. De Vries: Yes, sir.

The Chairman: I assume it will take you some time?

Mr. De Vries: Yes, sir.

The Chairman: Would you rather adjourn then at this time and reconvene at 2 o'clock?

Mr. De Vries: I think so.

The Chairman: Very well, we will adjourn then until 2 o'clock.

(Whereupon, at 12:30 o'clock p. m., a recess was taken until 2 o'clock p. m.)

After Recess.

(The hearing was resumed at the expiration of the recess at 2:00 o'clock p. m.)

The Chairman: The hearing will be resumed.

C. F. Graff, the witness on the stand at the time of the taking of recess, resumed the stand and testified further as follows:

Cross-examination (continued):

The Chairman: Mr. Graff, you had completed your formal testimony this morning?

The Witness: Yes, sir.

Mr. De Vries: I would like to ask Mr. Graff some questions.

Commissioner Culbertson: Could I ask one question I overlooked this morning?

By Commissioner Culbertson:

Q. What is your connection with the Graff Construction Company? A. I am the president.

Q. Is that a general building company operating generally in the State of Washington? A. At the present time they are not operating generally. They were up to the time that this proposition was undertaken.

Q. Did that company construct the plant of the American Nitrogen Company? A. Yes, sir.

Q. On what basis? A. On a commission basis.

Q. Cost plus 15 per cent basis? A. Yes, sir.

Q. And the profits went to the Graff Construction Company? A. The commission went to the Graff Construction Company, by the agreement entered into when the Nitrogen Company was organized.

Q. May I ask whether the wartime cost of that plant is the basis of your capital value now, in these statements that were referred to this morning? A. The plant, Mr. Culbertson, was built prior to the advance in prices. In other words, it was built in 1917, before the prices went to war prices, and I think the prices today, if it were valued on present prices, would be higher than what we have given the Commission.

Q. You say the Graff Construction Company is no longer a going concern? A. Oh, yes; they are a corporation, but they are seeking no outside work. They are giving their whole energies to the development of the nitrate business.

Q. Then, if you extend this plant as you suggest that you will, the Graff Construction Company will presumably do the work? A. That may and may not be the case.

By Mr. DeVries:

Q. They have a contract that they shall have that right, have they not, Mr. Graff? A. They have a contract giving them that right, but there is some talk about modifying that contract.

Q. You are the President of both companies, are you not? A. Yes, sir.

Q. Are the majority stockholders identical? A. Yes; the stockholders—well, partially so; not altogether.

Q. I mean the voting stockholders. A. Most of the stockholders in the Graff Construction Company are also stockholders in the Nitrogen Company.

Q. The preferred stockholders of the Nitrogen Company have no vote? A. They have only preferred stock, non-voting stock.

Q. They are not entitled to notices of meetings of the corporation? A. Not the regular meetings. They are entitled to notices of special meetings.

Q. Who owns the common stock, the voting stock? A. That is owned primarily by Seattle people.

Q. What Seattle people? A. Well, there are dozens of them.

Q. Do you and Mr. Blaine own a majority of the common stock? A. In which company?

Q. In all of these companies, or any one of them. A. No; Messrs. Blaine and Graff own 50 per cent in the Nitrate Company.

Q. In the Nitro Company? A. Yes, sir; that is, of the common stock.

Q. Common stock? A. Yes, sir.

Q. Who owns the common stock in the American Nitrogen Products Company? A. The same parties, with the addition of a couple of other small stockholders.

Q. That is, yourself and Mrs. Blaine and Mr. Blaine? A. Mr. Blaine.

By Commissioner Culbertson:

Q. Who is Mr. Blaine? A. He is a citizen of Seattle.

By Mr. De Vries:

Q. In this original contract that was made in 1915—wasn't it, Mr. Graff? A. Which contract?

Q. The contract which gave the Nitro Company the right to construct all plants for the American Nitrogen Company, of which you have just spoken. A. You mean which gave the right to the Graff Construction Company to construct plants for the Nitrogen Company?

Q. Yes. A. That was in 1915.

Q. Mr. Blaine was a stockholder with you in that? A. Yes, sir.

Q. We will come to that a little bit later, in a more orderly way.

By Commissioner Culbertson:

Q. That contract is a binding contract now, is it, still in force? A. Oh, yes; that contract is still in force, unless it is modified.

Q. It has no time limit? It does not expire? A. As I remember it, I do not think so. I want to explain, Mr. Chairman, in connection with that, that the undertaking of this project was put up by certain promoters in the year 1915, to the Graff Construction Company, and the members thereof undertook it and developed it, and a certain agreement was made as to the stock holdings and various other matters, on which conditions the Graff Construction Company and these men agreed to go ahead with the work. One of the conditions was that the Graff Construction Company, inasmuch as they guaranteed to give up all their other activities in construction work, were to do the construction work in the development of the nitrate work on a certain specified commission. We have endeavored to live up to those conditions since.

By Commissioner Culbertson:

Q. The Commission was 15 per cent? A. Yes; as I remember it, it is.

By Mr. De Vries:

Q. Just while we are on that, for a moment, Mr. Graff, there were four parties to that agreement, were there not, the American Nitrogen Products Company, the Nitro Development Company, the Graff Construction Company, and C. F. Graff and E. L. Blaine, parties of the fourth part? A. That is correct, I think.

Commissioner Glassie: It seems to me, Mr. Chairman, that if this detail with regard to these contracts is at all relevant, the contracts ought to be produced, at least in the interest of economy of time. They are not a part of the applicant's case, I take it, necessarily, and therefore there is no strict right to cross-examine with respect to them. If they are material, as they may very well be, in showing the financial background of this particular plant or this particular industry, it would be much shorter, much simpler, and much more legal, I submit, to produce the papers and have done with it. To try to produce the contents of a paper which is not produced, by verbal examination of the witness, is not legally sound, and is purely not conducive to expedition.

The Chairman: We are required to get the cost of production in this country and abroad, and in figuring costs of production capital investment, of course, is an important item. I have permitted the questions to be asked because they throw some light upon the methods and plans of capitalizing this company. If the relevancy of the testimony is questioned, the Commission will decide the point. It has not been questioned. I have permitted the questions to be asked and the witness has volunteered his answers. He was not compelled to answer, as he did not testify himself on those points.

Mr. De Vries: I submit, Mr. Chairman, that these questions are fundamental to the value of this plant which is producing this nitrogen today; what the plant cost, what was paid for it, how it was constructed, and particularly the patents under which this plant is operated.

Commissioner Glassie: Judge De Vries, is not the more orderly method of dealing with that, if the facts involved in these contracts be relevant, to ask to have them produced? To prove the contents of a paper by oral examination surely will not advance anybody anywhere if the issue be a relevant issue, because nobody would be bound by any such testimony.

Mr. De Vries: I assume, Mr. Glassie, that this witness is hostile. I assume that these are fragments of testimony which we get hold of, and that this Commission would like to know all sources of information upon this subject. If by this record we can indicate to this Commission the sources of investigation, I think the Commission would be glad to receive it.

Commissioner Glassie: I want to say for myself that I think this is a waste of public time, to attempt to go into the details of a collateral business transaction by the oral examination of a witness without the production of any documents. It is hardly necessary to go through an elaborate examination and cross-examination in detail for the purpose of indicating sources of information. If counsel wants the Commission to investigate any particular source of information, a request to that effect should be made and expeditiously disposed of, but this is the slowest method known to the law, namely, attempting to get out of the recollection of a witness the contents of a paper.

The witness is not chargeable with knowledge of the contents of a paper. His answer is absolutely irrelevant, immaterial, and inadmissible at law, and as a mode of indicating sources of information it is, I submit, roundabout, tedious, and wasteful.

Mr. De Vries: I had supposed that we were approaching the cost of production, and I have listened for two hours this morning for testimony on cost of production, and I confess I have not heard any yet. This very incident which we are asking about now concerns the assets of this company.

The Chairman: Proceed with your questions.

The Witness: Mr. Chairman, that information is all in detail in the data submitted, showing our costs of investment, showing the actual cost of the plant. Nothing is included on common stock, or any of those things. It is all given in the data.

Mr. De Vries: We do not know anything about that. We will come to it in another way, and try to expedite the matter.

Commissioner Glassie: If you think the Commission should give you this information, Judge, a request to the Commission would raise the issue and get it settled.

Mr. De Vries: I have made that this morning. It is of record.

Commissioner Glassie: We either have the right to give you this information or we have not. If we have it in documentary form and you are entitled to have it, your request upon us would have to be answered. That would be much shorter than trying to get the witness to piece out his recollection as to the contents of papers made seven years ago.

Mr. De Vries: This thing started seven years ago, and the fundamentals of it are in the transactions of seven years ago.

The Chairman: Please proceed with your questions, Judge De Vries.

Mr. De Vries: We will approach that in another way.

By Mr. De Vries:

Q. Are you operating your plant now, Mr. Graff? A. Yes, sir, partially.

Q. Why not wholly? A. We cannot sell the material at a reasonable price.

Q. How much of your output have you contracted now? How much of your output have you under contract of sale now? A. We are at the present time storing our goods because we cannot sell them.

Q. How much of your monthly output are you storing? A. We are storing all that we make at the present time.

Q. Have you any live contracts today that you are delivering under? A. I think not.

Q. Do you know? A. No contracts.

Q. Are you making any deliveries? A. They are fulfilled. We have been unable to secure any additional contracts.

Q. Are you making any deliveries? A. Not at the present moment. We are storing.

Q. How about this month? Have you made any sales this month? A. No, sir.

Q. Last month? A. I think last month, yes.

Q. What were the sales prices? A. We sold last month about 7½ cents per pound, New York.

Q. New York delivery? A. I could not say positively whether it was 7½ or 7¼.

Q. Mr. Graff, you stated that you established your plant in 1917, and at that time there were no importations. Is that your recollection? A. 1917.

Q. Yes. A. I am not sure whether there were or were not. I think there were importations in the year 1917.

Q. Didn't you make the statement that importations had been cut off by the war, and you constructed this plant to supply the domestic demand? A. By the war, I meant our entry into the war.

Q. Yes. A. They were being cut off, and in 1917 some time they had practically ceased, as I remember it, but we did not enter the war, as you will remember, until 1917.

Q. How much of the American demand were you able to supply at that time? A. 1917?

Q. Yes. A. A comparatively small proportion.

By Mr. De Vries:

Q. Your extreme capacity is around 1200 tons a year? The Witness (addressing the Chairman): Mr. Chairman, that is information which we have considered confidential, that is, our exact capacity, which is given in the data submitted.

By Mr. De Vries:

Q. We did not get it from the data you submitted, Mr. Graff, you can rest assured of that. A. We consider the exact capacity of the plant as a trade secret; also our actual costs of production, because of the fact that they, in turn, depend upon the processes and numerous things which certainly are confidential information and should not be furnished to our competitors.

By Commissioner Glassie:

Q. You have not furnished that to the Commission, however? A. Yes, sir; we have furnished them to the Commission. We have given all of that to the Commission.

Commissioner Glassie: Again I submit, Mr. Chairman, that the question as to whether this information is to be given out must be decided. The issue has got to be met, and it might as well be met definitely in this case as in any other.

The Chairman: The Commission has considered that when anyone submits information to it which is declared to be confidential, it shall observe the confidential relation.

Mr. De Vries: Mr. Graff has made the statement that during the war importations were practically cut off, and they established this plant in order to satisfy the American demand. As a matter of fact importations increased almost every year during the war, and we are prepared to show that from well-known statistics; and that the capacity of their plant is about 1200 tons a year; and that the consumption at that time was about 11,000,000 tons a year.

The Witness: I beg your pardon; 11,000,000 tons?

Mr. De Vries: 11,000 tons.

By Mr. De Vries:

Q. The present consumption in the United States, you have testified, however, is according to your idea, Mr. Graff—— A. (Interposing.) I beg your pardon?

Q. What is the present consumption in the United States? A. I think from three to five thousand tons per annum. I cannot understand where you get your 11,000.

Q. In your testimony before the Ways & Means Committee you testified at that time that the annual consumption was about 5,000 tons, did you not? A. It is possible I did.

Q. Is it greater or less at the present time? A. I was just going to say that I think at the present time it is less.

Q. Of course, as I understand your petition, one of the grounds of your petition is your ability to supply the American market. Therefore, you want this rate of duty raised? A. I beg your pardon. We are not claiming that. We are claiming that we are able to supply a very considerable part of the American market, but there are other domestic producers.

Q. What would be the equivalent ad valorem of 4½ cents specific today? A. What was the question?

Q. What would be the equivalent ad valorem to 4½ cents specific today, upon nitrite? A. If you figure it on the same basis they do in the dye stuffs, namely, on the market selling price, which is the basis for the ad valorem duty on dyestuffs, it would be considerably less than the dyestuffs are getting.

Q. That is not a frank answer, Mr. Graff, I do not think, because this is not assessed upon the American valuation, is it? A. I beg your pardon?

Q. Is nitrite assessed upon the American valuation? A. It is not assessed on any valuation; it is a specific duty.

Q. What is the equivalent of it? A. I could not tell you. It has nothing to do with ad valorem duties at all; but what I meant to say was that if you wished to transpose the specific duty of 4½ cents per pound on nitrite into percentages ad valorem, it would be less than they are getting on the dyestuffs, and, as I remember it, approximately the same, 50 or 60 per cent. I could not say offhand.

Q. What do you figure is the foreign cost, when you say that 4½ cents is necessary in order to protect the American industry? A. There are different ways of figuring the foreign cost. One way is to look upon it, as I stated this morning, from the standpoint that nitrite and nitrate cost the same to produce; in other words, that the cost of production of nitrite or nitrate will be carried on the books of the Norwegian company at the same cost, and that one can be sold at the same price as the other, because that is really a fact. They make nitrite first, and then they have to transpose it into nitrate in order to sell it as nitrate, and we know that they are selling the nitrate in the American market at 2.65 or 2.7 cents per pound, so, in one way, you might consider that the foreign cost of production, that is, the Norwegian cost——

Q. (Interposing.) What is nitrite? Is it a by-product? Do you consider it a by-product? A. In the case of the Norwegians, I would say so.

Q. Why do you say so? A. For the reason that they make it from the end gas in the last tower, and if they did not make it, they would simply let the gas go out in the air and lose it.

Q. And in your process the same as the Norwegian process? A. Not in that respect. We make it as a major product.

Q. What are the other differences between the Norwegian process and yours? Is yours a patented process, Mr. Graff? A. Well, I think only as regards the furnaces. The difference, as I stated this morning, is that they have a plant in which they make primarily weak nitric acid, and they add that weak nitric acid to limestone, which makes calcium nitrate fertilizer, and that is their primary product. In doing this, in making this acid in their towers, a certain amount of the gas goes to waste unless they catch it with soda, and that soda is what gives them their soda nitrate-soda nitrite by-product or end product.

Q. In your petition, Mr. Graff, you have alleged that your outsanding capital stock, fully paid up, is $1,229,500. I think that is correct.

Q. Is that common stock? A. $750,000 of that is common and the balance is preferred.

Q. How much is the total common and preferred stock in your corporation? A. The figure you gave is the total outstanding stock.

Q. How much is it incorporated for? A. $10,000,000.

Q. Divided how? A. Divided into nine and a quarter million preferred, and $750,000 common.

Q. Of this $1,229,500 that is fully paid up, is the common fully paid up? A. Not paid up in cash, no, sir.

Q. How much of that is common, did you say? I did not follow you? A. $750,000.

Q. $750,000 of the $1,229,000? A. Yes, sir.

Q. How is that paid up, the $750,000 common? A. That is a stock transaction in the organization of the company.

Q. What do you mean by a stock transaction in the organization of the company?

The Witness (addressing the Chairman): Mr. Chairman, should I go into all these organization details at this time? We have shown in the data submitted to the Commission the segregation of our stock; we have shown that in so far as this common stock is concerned, it is not considered at all in connection with our costs, and that the only thing that enters into this question is the question of cost, and in so far as the capitalization affects cost. We have shown in the data submitted to the Commission that only the actual investment in the La Grande plant is considered in connection with our costs, and all these questions are entirely irrelevant.

Mr. De Vries: Mr. Chairman, we can only go by the petition we have before us, and it prays for interest on this investment.

The Witness: I could talk all day on this subject, but I do not think it is going to get us anywhere, and it is presenting a lot of the company's inside affairs to the public in general, with which they are certainly not concerned.

The Chairman: I cannot see that it has any bearing upon the equalization of costs of production here and abroad, unless you are paying large, inflated dividends on an inflated capitalization.

The Witness: Mr. Chairman, there is no anxiety over dividends. We have not declared any for several years.

Mr. De Vries: We have before us, Mr. Chairman, only the petition, or parts of the petition, which alleges that

"our outstanding capital stock fully paid up is $1,229,500. The above profit is therefore merely nominal and would be entirely inadequate for a dividend." He has asked for profits upon $1,229,500 in this complaint. That goes to cost of production. We want to find out what this plant cost, what is a fair profit upon the investment, and what his labor in that plant costs, what his overhead charges are, etc.

Commissioner Glassie: Judge De Vries, the trouble about it is that those inquiries are purely collateral You are entitled to know what his cost of production is, it seems to me, at least, and he is entitled to know what the cost of production of your clients is, if you come to measure them in the final analysis, so that it means a full disclosure of costs of production of all parties to this controversy. But the Commission has not so ruled heretofore. However, if that be the sound view, nevertheless, you are not proving it, because it is common knowledge that the capitalization of these American corporations, as regards the issue of their stock, has no necessary relation with the plant investment. The plant investment is a fact that can be proved directly. If the Commission has the facts as to the capital invested in the plant, has obtained that information, the simple, direct way to get that information, if you are entitled to it, is to request the Commission to give it to you.

Mr. De Vries: That is just my position. Not having been afforded that, we are going to reach it in the best way we can. That is what we are endeavoring to do.

Commissioner Glassie: I think the Commission should pass upon your request and settle the question whether you are entitled to that, because it surely would not be able to give you by indirection what it declined to give you directly.

The Witness: Mr. Chairman, if it will help matters any, we are perfectly willing, I think, in view of what is stated here, to disclose that actual cost of our La Grande plant as given in the data to the Commission, and show that that is the only cost or investment on which cost of production has been figured.

The Chairman: That would help materially.

By Commissioner Glassie:

Q. You have already given us that? A. Yes, sir.

Q. It is in the record? A. Yes; but we have given it to you in confidence, so far.

Q. The point is not that, Mr. Graff. The point is this. How are Judge De Vries' clients to deal with the issue if that evidence is not disclosed to them? A. We say we are willing to have it disclosed. That particular item we are willing to disclose.

Q. How much of it are you willing to disclose? A. The point he is asking.

The Chairman: Will you please proceed with your questions, Judge De Vries?

Commissioner Glassie: If you are ready to disclose it, why don't you disclose it?

The Chairman: He is waiting for the question.

Commissioner Glassie: He has been objecting right straight along to the disclosure of this thing. If it is going to be disclosed, let us have it disclosed and get it over with.

By Mr. De Vries:

Q. Do I understand from that, Mr. Graff, that you are willing for us to examine your petition that is on file, as to cost of material—— A. (Interposing.) You are endeavoring, as I understand it, to get at the actual cost of investment of the La Grande plant.

Q. Exactly. A. As included in our figures on cost of production.

Q. Exactly. A. I will give you that.

Q. And the labor you employ there. A. If I have it here.

Q. What you pay for your power, what you pay for your overhead—— A. (Interposing.) No, sir; we are talking now about the cost of the plant.

The Chairman: Take one item at a time and ask the question, and see if the witness will answer. Let us make some progress.

By Mr. De Vries:

Q. What do you estimate to be the cost of your plant at La Grande, Mr. Graff? A. Without referring to the exact figures, I would say that it is——

Commissioner Glassie (interposing): Why not refer to it exactly? What is the use of having these guesses?

The Chairman: Let us have the answer, please.

Commissioner Glassie: Mr. Chairman, I seriously object to this mode of conducting the inquiry, and if it is continued I shall not participate in it. It seems to me it is wasting the time of the Commission to guess at a figure which is already in evidence.

The Chairman: The witness has not answered the question. If there is any criticism of the answer after it is made, we will entertain it.

The Witness: Approximately, our investment is $250,000 to $300,000, but I will see if I can get the exact figures here. (After examining papers:) As near as I can ascertain from the figures here, without scrutinizing them carefully, it is about $200,000, as the cost shown in figuring our depreciation, which depreciation was included in our unit manufacturing costs. The details of that information are in the file.

The Chairman: Answer, from that information, the questions the Judge asks.

Mr. De Vries: If that is the statement, might we not have a copy of it, instead of going into all this detailed examination?

The Chairman: If you want to bring out these points for the record, ask him the questions and put his answers in the record. He has answered your question.

By Mr. De Vries:

Q. Do you have a statement of the cost of your plant, the operating plant at La Grande? Do you have that statement here, Mr. Graff? A. Which cost do you refer to?

Q. The construction of the plant. A. Our construction cost?

Q. Yes. A. That is shown here.

Q. Do you have a statement like that? A. No; I have no statement; nothing further than this.

Q. What does that show? A. This shows $200,000. It was constructed in several units—$200,000, as near as I can add it up here, on which depreciation was figured. Of course, the actual cost of investment does not enter into our unit costs, except in so far as depreciation is concerned.

Q. Have you the unit cost of the labor employed in that factory? A. We have all that, but that is all information which we certainly do not consider we should give to our competitors, the cost of our labor, or the cost of our power, or the cost of our raw material, and all that. That is competitive information, and it is in the hands of the Commission. But we are willing to give you, in view of the fact that you are trying to prove that we are over-capitalized, and that we are charging in our common stock, and all this and that, against our cost of production—we are willing to say that is not so, and we have only charged in the actual cost of the plant, which is a very low one, of about $200,000.

Q. What have you estimated to be the value of your patents? A. That is information that we do not care to disclose.

By the Chairman:

Q. Is the value of your patents, or any estimate you have formed on the value of your patents, figured in in your estimated cost of production? A. Not one dollar.

The Chairman: Then, the question is not material.

The Witness: Not one dollar.

By Mr. De Vries:

Q. How much do you estimate as the cost of your power? A. We do not care to disclose our power rate to our competitors.

By the Chairman:

Q. But you have submitted that to the Commission? A. Yes.

By Mr. De Vries:

Q. Is there any State regulation in the State of Washington controlling the cost of power? A. No, sir.

Q. Is this power employed in your plant owned by you, or owned by another company? A. The power?

Q. Do you buy power? A. We are buying.

Q. You buy from another producing company? A. We buy from several sources.

Q. Do you pay any commissions upon your sales, Mr. Graff? A. Sales of nitrite?

Q. Nitrite. A. On those sales we make through brokers, yes; on those we make direct, no.

Q. Do you have an agency in New York? A. No, sir; no established agency.

Q. Do you sell through certain brokers in New York, or in the east? A. Sometimes; sometimes direct.

Q. Is Mr. Garrigues an agent of yours in the east? A. No, sir.

Q. Mr. Campbell? A. No, sir.

Q. Were they in July, 1923? A. No, sir.

Q. Have they ever been? A. No, sir.

Q. Have you ever made any quotations in the last three or four months at less than 7 cents, or around 7 cents, in the east? A. We have made quotations, that is, forced quotations, as explained to the Commission, on account of the foreign competition, between 7 and 7½ cents. Mr. Chairman, on July 2nd, for instance, on that subject we wrote to the Commission as follows:

"The strain of endeavoring to exist in the face of present stagnation in the market as a result of the heavy importations of sodium nitrite is telling on us more and more and we are writing you once more to urge all possible speed in furnishing us additional relief. We have recently found it utterly impossible to dispose of nitrite at even the low prices heretofore prevailing, namely, around 8¢ per pound and have been compelled to sacrifice material at figures even lower than this. We are disposing of some material without regard to cost in order to continue living in the hope of the increased duty but we wish to urge such relief as strongly as we possibly can. If a public hearing is absolutely necessary, can you not set the date for same within the next thirty or sixty days?"

We wrote that on July 2nd, and the hearing was set for September 10.

By Mr. De Vries:

Q. About that time did you ship any goods east, Mr. Graff? A. We have been shipping off and on up to recently, yes.

Q. Is Mr. Campbell an agent of yours in the east? A. I just answered that question in the negative.

Q. He is not? A. We have sold material through various brokers in New York, and Mr. Campbell has sold material, but he is not our agent.

Q. You have sold material through him? A. Yes.

Q. And offered it through him? A. On occasions, but he is not our agent.

Q. Did you ever make the statement to any brokers or purchasers in the east, Mr. Graff, that you could undersell any prices of any of the foreign competitors? A. No, sir.

Q. Did you authorize your agents to make that statement? A. No, sir. On the contrary, our statements all along have been to our brokers and everyone else, that we need the additional duty.

Q. In your petition under the Anti-Dumping law, since you have mentioned that, what statement did you make as to the price at which the Dupont sale was made by the Norwegian Nitrogen Products Company? A. I think the statement made at that time was based upon certain information which we had, in the nature of telegrams from New York, that we could not secure the business at over 7 cents per pound.

Q. Did you make a positive statement as to what the Norwegian Products Company received in that contract? A. We made the statement that to the best of our knowledge it was 7 cents per pound, and subsequently that we have verified from invoices and information given as to invoices, that the actual price was 7¼ cents a pound.

Q. You did not make the statement that it was 4½ cents? A. Sir?

Q. You did not make the statement that it was 4½ cents? You did not make the statement that that sale price to the Du Ponts was 4½ cents? A. I just said 7¼.

Q. I just want to have a positive answer on that one way or the other. You did not make the statement that it was 4½ cents? A. You mean net?

Commissioner Glassie: You mean duty paid.

Mr. De Vries: Duty paid.

The Witness: No, sir; it was below 4½.

By Mr. De Vries:

Q. 4¼? A. Certainly.

Q. You have made the statement to the Commission, and therefore I think some note might be taken of it, because we do not want to be prejudiced in this matter, that appraisement orders were issued and importations were being held up on appraisement orders. Do you know that to be a fact? A. No, sir; I did not say that. I said that the Treasury Department—and I read the letter—has issued instructions to withhold appraisement entries.

Q. Pending investigation? A. Yes; and that means that if you are now importing, you are taking the chance of an anti-dumping duty being assessed against you. I did not say that it absolutely prohibits importations.

Q. That is your construction of the procedure of the Treasury Department. It calls for an investigation, doesn't it? A. No, sir. That is not our construction at all. That is what the law says, and what the officials tell us.

Q. Do you know that the Treasury Department made an investigation of this matter? A. Yes, sir.

Q. And have not held up any appraisement orders? A. I beg your pardon?

Q. Do you know that the Treasury Department made an investigation of this matter, and were satisfied, and were not holding up any appraisement orders? A. No, sir; that is not a fact.

Q. You know that is not a fact? A. I know that is not a fact, because I saw the officials on Saturday.

Q. What order had they held up recently? A. I did not say they had held up any importations, because there may not be any coming in, but if one does come in, the appraiser at the port of New York will withhold the appraisement report.

Q. How long has that been the case? A. August 20th.

Q. I can say to the Commission that the importations are coming in periodically. A. The importations may come in right along. They may be assessing extra duty.

Q. I can say that is not true, in order that the Chairman of the Commission may have my statement upon that subject, after having made an investigation. A. The letter speaks for itself.

Mr. De Vries: I suppose the Commission is going to take under consideration just what portion of these statements will be shown to us for examination.

The Chairman: What we can submit, Judge De Vries, will be ready in a few days.

Mr. De Vries: And we will have an opportunity to submit contra matter?

The Chairman: You will have an opportunity. We will set a date for final hearing, at which briefs can be filed and arguments presented.

Mr. De Vries: There is——

The Chairman (interposing): Have you any direct testimony to submit?

Mr. De Vries: Not today, no.

Commissioner Glassie: Does he mean that there will be more testimony after this or not?

The Chairman: That is what I am going to ask.

Commissioner Glassie: I mean after this hearing.

The Chairman: Are there any others present who desire to offer testimony at this hearing this afternoon?

Mr. De Vries: Not this afternoon, no, sir.

Commissioner Glassie: Not this afternoon, Judge De Vries said, Mr. Chairman. The question is, will there be any more testimony, and opportunity to give testimony?

The Chairman: The hearing will come to order, please.

Commissioner Glassie: "Not today."

The Chairman: If there are no others present who desire to offer testimony, the Commission is ready to set a date for the filing of briefs and for the final argument.

Mr. De Vries: I can say to the Chairman that the testimony which we shall offer in all probability will be altogether documentary.

The Chairman: I again state that the opportunity for presenting testimony will now close, if there are no further witnesses present who desire to offer testimony at this time. The Commission will set a date upon which briefs must be filed and final argument made.

Mr. De Vries: Will we not have a right to submit documentary testimony, Mr. Chairman?

The Chairman: You will have a right to submit briefs and present argument.

Mr. De Vries: And no testimony of any kind in answer to what we may find is disclosed here?

The Chairman: I understand that is your privilege in submitting briefs and in presenting your final argument, to argue on the facts presented in the record at this hearing, and in the statement which the Commission submits to you of the facts in its possession.

Mr. De Vries: Will we have no right to submit documentary evidence in reply to the statements that are submitted?

Commissioner Culbertson: What you want, Judge De Vries, I believe, is this, the privilege to submit, between now and the time of the filing of briefs, any further information in documentary form that you may think relevant.

Mr. De Vries: Yes, and in reply to what will be exhibited to us, and which we have not had a chance to see.

Commissioner Glassie: How can that be done without the other side having an equal opportunity?

The Chairman: They do have an equal opportunity.

Commissioner Culbertson: May I suggest that either side be permitted, between now and the time fixed by you for filing of briefs, to submit any documentary evidence which they deem to be relevant, furnishing the other side with copies, as well as the Commission? Then you can fix the time for filing briefs, and the date for the final argument.

The Witness: Our evidence is all in. We have nothing more to submit.

Commissioner Culbertson: You may have some reply, however, to what the other side may offer. That is what you want?

Mr. De Vries: Exactly.

Commissioner Glassie: You want to have a chance to rebut the information upon which the Commission is likely to act?

Mr. De Vries: Exactly.

The Chairman: I think that is included in the extension of the hearing, and the setting of the date for final argument. If that is what Judge De Vries has in mind, it is what the Commission has done in other cases, and what it is ready and willing and anxious to do in this case. The Commission will set September 20th as the adjourned date of hearing, for final argument, and the final date for filing briefs with the Commission.

Mr. De Vries: Does that include the right to file contra evidence, documentary evidence in reply, in rebuttal of what is in here now?

The Chairman: It is included in your argument.

Mr. De Vries: I want to suggest, Mr. Chairman, that it is impossible for us to get our data together by the 20th. It is the 10th now, and you cannot get a letter out to Seattle and back, and you cannot get anything intelligent from Norway and back in ten days.

The Chairman: What is the earliest date you can be ready?

Mr. De Vries: I would say the 30th.

The Witness: Mr. Chairman, it seems to me that certainly ample opportunity has been given to submit evidence, and to submit everything relative to this question. The Commission's experts have been in Norway, but have been refused information as to cost of production, and now they come in here, after the hearing has been called, and ask for another twenty days. I have come east to attend this hearing, and I am willing to discuss everything at this time that is relevant, and that should be disclosed, and it seems to me that an additional week or ten days ought to be ample.

The Chairman: The Commission suggested that, and the attorney for the parties in interest has asked for further time. The law provides a reasonable opportunity to be heard, and the Commission is desirous of granting that reasonable opportunity.

Commissioner Glassie: I would like to ask you a question, Judge De Vries, if you do not mind. Do you represent the Norwegian Nitrogen Products Company?

Mr. De Vries: Of New York.

Commissioner Glassie: What is the relation of that company to the Norsk Nitrate Company, or whatever it is, of Norway?

Mr. De Vries: I understand that they are purchasers for the American markets.

Commissioner Glassie: Are they under exclusive sale contract of any kind?

Mr. De Vries: I cannot answer that at the present time.

Commissioner Glassie: Do you happen to know whether or not the Norwegian Company disclosed its cost to our agent?

Mr. De Vries: My impression is that they are the exclusive representatives in this country.

Commissioner Glassie: Do you happen to know whether the Norwegian Company made a disclosure of its costs of production to our investigator?

Mr. De Vries: Your Mr. Long could probably tell you better than I. I do not mean to be disrespectful. I do not know.

Commissioner Glassie: If you do not know, I do not expect you to state. Do I understand that if this question is gone into further, and the Commission discloses, in some lawful way, the information that you have asked for, that you desire to rebut that, or have an opportunity to rebut it, and in so doing, you will prove Norwegian costs of production?

Mr. De Vries: Those are two different propositions.

Commissioner Glassie: They are not connected in your offer at all?

Mr. De Vries: No.

Commissioner Glassie: The Commission will have no assurance that if it has not already the Norwegian cost of production, it will get it through this evidence?

Mr. De Vries: It might not be necessary.

The Chairman: Judge De Vries, I would like to extend the time as much as possible. You are interested in the question of the convenience of those involved. Would it be agreeable if we set the date at September 24?

Mr. De Vries: On that date I have before this Commission briar pipes.

The Chairman: We will set the date for further hearing September 25.

Mr. De Vries: I want to suggest to the Commission that the human system has limitations. I have three very important cases before this Commission in the next few days. On the 18th I am to make answer in the paint brush handles' case, which is an important matter to the Commission. On the 24th I have briar pipes, which requires a very extended investigation, and to bring this matter in within the next few days, I think, is quite a burden.

The Chairman: The Commission will set the date, after careful deliberation, as September 26. If no further wit-

nesses desire to be heard today, the hearing is now adjourned until September 26, at 10 o'clock.

(Whereupon, at 3:00 o'clock p. m., the hearing in the above entitled matter was adjourned to Wednesday, September 26, 1923, at 10 o'clock a. m.)

Exhibit 7.

Indorsed: U. S. Customs Court. Exhibit 7. Prot. No. 92852-G, &c. Date: 11/24, 1930. S. C. H., Reporter.

BEFORE THE U. S. TARIFF COMMISSION.

Investigation No. 7, Section 315, Tariff Act of 1922.

In the Matter of the Investigation of the Costs of Production of Sodium Nitrite.

WASHINGTON, D. C., October 6, 1923.

The above-entitled matter came on for further hearing at the office of the United States Tariff Commission, 7th and E Street N. W., at 10 o'clock a. m.

Present:

Commissioners MARVIN (Chairman), CULBERTSON (Vice-Chairman), BURGESS, GLASSIE, COSTIGAN, and LEWIS. Present also: Secretary BETHUNE.

Appearances:

Mr. C. F. Graff, President American Nitrogen Products Company, 907 Securities Bldg., Seattle, Washington, and McCumber & Sullivan, 203 Commercial National Bank Bldg., Washington, D. C., appearing in behalf of American Nitrogen Products Company.

Mr. Marion De Vries (De Vries & Doherty), 406 Southern Building, Washington, D. C., appearing in behalf of Norwegian Nitrogen Products Company, 17 State Street, New York.

Mr. A. Lundh, Commercial Counsellor, appearing in behalf of Norwegian Legation, Washington, D. C.

The Chairman: The adjourned hearing in connection with the costs of production of sodium nitrite is now opened. The Secretary will read the official notice of the hearing.

The Secretary: Mr. Chairman, on September 26th the hearing was concluded with the statement that the hearing would stand adjourned until Saturday morning, October 6, 1923, at 10 o'clock a. m. There was no publication of this order, other than its entry in the minutes.

The Chairman: The Commission is ready to rule on the requests of counsel for the Norwegian Nitrogen Products Company. The Secretary will now read the ruling of the Commission.

The Secretary (reading):

"Upon request made by counsel for the Norwegian Nitrogen Products Company on September 26, 1923, at the public hearing in the Investigation (No. 7) under the provisions of Section 315 of Title III of the Tariff Act of 1922, in respect of sodium nitrite, the Commission rules as follows:

"1. The Commission, in addition to holding a public hearing in which Judge De Vries participated as counsel for the parties of record represented by him, has submitted to the parties appearing at such hearing a written statement embodying the result of the Commission's field investigation. At the adjourned hearing, set for October 6, 1923, all parties interested, including those represented by Judge De Vries, will have an opportunity to meet the matter embodied in such statement. In so far as the first request of Judge De Vries is a request for leave to inspect the original and primary data collected by the Commission's investigators in the field and embodied in such statement, or is a request for additional information respecting the same beyond what the Commission has already submitted, the request is denied.

"2. At the adjourned public hearing, set for October 6, 1923, opportunity will be afforded all parties interested to offer any evidence they may have with respect to the matter embodied in the Commission's statement of the field

investigations conducted by its staff and such parties will have opportunity to be heard upon the same. In so far as the second request of Judge De Vries is a request to offer evidence and to be heard upon the question of the cost of power in the United States for the production of nitrites and to offer evidence and to be heard in respect of the matter embodied in the statement submitted by the Commission to the parties, the request is granted. In so far as it is a request to inspect the original cost and other data collected in the field by the Commission's investigators or the figures showing the details of individual costs of production obtained by the Commission under the sanction of Section 708 of Title VII of the Revenue Act of September 8, 1916, the request is denied.

"3. At the adjourned hearing set for October 6, 1923, all parties interested will be afforded an opportunity to offer any relevant and material evidence in their possession with respect to the number of laborers employed and the wages paid by the American Nitrogen Products Company. To this extent the third request of Judge De Vries is granted; but in so far as that request asks for inspection of the original data showing the production costs in respect of labor of the American Nitrogen Products Company submitted by or obtained from said company under the sanction of Section 708 of Title VII of the Revenue Act of September 8, 1916, the request is denied.

"4. At the adjourned hearing set for October 6, 1923, all parties interested will be afforded an opportunity to offer any relevant and material evidence in their possession with respect to capital invested in the American Nitrogen Products Company. To this extent the fourth request of Judge De Vries is granted; but in so far as that request asks for inspection of the original data relating to the production costs of the American Nitrogen Products Company submitted by or obtained from said company under the sanction of Section 708 of Title VII of the Revenue Act of September 8, 1916, the request is denied.

"5. The fifth request of Judge De Vries, in so far as it asks for an opportunity to cross-examine experts of the Commission with respect to the costs data and other mat-

ter obtained by them in the course of the investigation in the field, is denied. But at the adjourned hearing set for October 6, 1923, all parties interested will be afforded an opportunity to offer any relevant and material evidence in their possession, and to be heard, with respect to the matter embodied in the Commission's statement heretofore submitted to the parties interested appearing in such investigation. In so far as the fifth request of Judge De Vries is a request for an opportuntiy to meet, by evidence and argument, the matter embodied in such statement, the request is granted. In so far as it is a request to cross-examine the Commission's investigators concerned in obtaining the matter summarized in said statement with respect to the performance of their official duties and functions in such investigation, and in so far as it is a request for inspection of the cost data and other matter so obtained and embodied in said statement, said request is denied."

Mr. De Vries: Mr. Chairman, I want to enter an exception to the ruling of the Commission in each and every particular wherein our requests have been denied. Since the last meeting of the Commission's we have, in so far as possible, diligently endeavored to gather evidence, by telegram and by cable, in such form as could be obtained in that limited time. We have gathered considerable upon that subject. But the evidence is not completely digested, and in a great measure now is in the hands of the printer, so that we would not be able to submit it at this time, but it will be completed upon Monday. The printers, of course, will not work on Sunday. We have had them working overtime at night in part, and by Monday that work will be completed and we will then be ready to submit what we could gather in that limited time to the Commission.

Mr. McCumber: Mr. Chairman and Gentlemen of the Commission: On behalf of the American Nitrogen Products Company, and for the purpose of facilitating the hearing in this case, we desire to enter an objection at this time to any further testimony being received in this case. We base our objection upon the ground of the record, as it now stands.

As I read the record before this Commission in this investigation, in so far as the matter was directly before

the Commission in the hearing here, the Commission closed the testimony upon the 26th day of September. At that time it provided that the parties should file their briefs on the 6th day of October. I refer not only to the briefs but the arguments.

I understand that it is the rule of this Commission that these briefs must be printed and submitted to the parties and to the Commission.

The American Nitrogen Products Company has complied with this order of the Commission. It has printed its briefs and argument, and has served them upon the other parties who appear as interested parties in the proceedings and filed the requisite number with the Commission.

This being the situation, and there having been, at the time when this order was made, and at the last hearing, no agreement whatever for any further consideration of this case in the matter of producing evidence, and there having been fixed this day for the presentation of briefs and arguments, the party whom we represent seriously objects to the reopening of the case at this time.

These are our grounds, Mr. Chairman, for this objection. We desire to say right here that it seems to us that either the Commission made an error in ordering us to prepare our briefs and to present them on the 6th day of October, or else it made an error, at a time when we were not present and could not object, in entering an order that one of the parties in interest might reopen the entire case.

Now, there must be an error in one of the two positions, and it seems to us that the Commission is compelled to rescind one or the other. Of course, the Commission would not expect us to be bound by such testimony, and if there were further testimony to be taken in the case, we would have, of course, the natural right to rebut it and to answer it, and it would be a rather strange position that would compel us to submit our case upon a brief and argument that had been prepared in the middle of the case. So, it seems to us, that under the circumstances we have the right to ask that this case be closed. It has been closed, and all that we are asking now is that it shall not be reopened and the whole matter gone over again.

Before we get through with this case, and right here in this initial step, we desire to be heard upon the whole question of procedure. We are willing to be heard now, or to be heard after the Commission has passed upon this objection. We would prefer to have the hearing at this time if the Commission would allow us to be heard, because we would try to elucidate what we believe to be the proper practice; and I am certain that with the possible differences of opinion entertained by members of the Commission, it might be well to go right to the heart of that question, not only for the determination of this case, but also for cases that may arise in the future. I will leave it for the Commission to say whether we shall be permitted at this time to go into that subject, leaving this question in abeyance until we have closed our argument upon that feature.

The Chairman: The hearings held by the Commission in connection with the investigations into the costs of production are a source of information to the Commission relative to costs in this country and abroad. This hearing for final argument and for presentation of briefs is offered in accordance with the provisions of the law for the purpose of presenting information and seeking evidence and testimony in regard to costs of production of sodium nitrite in this country and abroad. If counsel and parties in interest have evidence to present as to costs of production in the United States or costs of production in Norway, every reasonable opportunity to present that evidence will be afforded.

In connection with Senator McCumber's request, which seems, in a way, to broaden the scope of the hearing, if it means a discussion of methods of procedure in general, I think the Commission would decline to enter into that phase of the question at this time. If it is a question of procedure bearing particularly upon the questions now before the Commission and open for discussion at this hearing, the Commission will be pleased to hear any pertinent suggestions in regard to procedure.

Mr. McCumber: Mr. Chairman, one of the objections that we have to any further testimony being received by the Commission at this time relates to the question of the Commission submitting its own findings, or such evidence as is produced in an independent investigation by the

Commission, for the cross examination or for the discussion or use of either party in interest; and, as the whole argument would be directed toward that one question, or almost entirely to that one question, which is really the deciding question in this case, I would say that my argument, while it might be broad enough, and necessarily would be sufficiently broad in scope to cover the field of practice, will aim directly to that particular phase of the question as to whether either party to the proceeding has the right to request or demand that the Commission shall submit its records of an independent investigation to the parties.

With that brief statement of what I purpose to try to elucidate, I will leave it with the Commission to determine whether I shall be heard.

The Chairman: The Commission will hear you further on that point.

Commissioner Culbertson: Judge De Vries, may I ask a question to clarify the situation? Do you expect to offer any testimony this morning through witnesses?

Mr. De Vries: No. All the information which I shall offer the Commission will be printed as a part of the brief.

Commissioner Costigan: It will not be sworn testimony?

Mr. De Vries: No, it will not.

Commissioner Costigan: It will be, however, new material.

Mr. De Vries: It will be in the form of telegrams, cablegrams and answers to them, and copies of official documents which are open to the Commission for investigation. That is all it was possible to secure in the few days we had to secure it.

Commissioner Culbertson: Do you submit them as evidence or as objections to the Commission which they are to follow up?

Mr. De Vries: Information in the case. They contain statements of facts which we submit as true.

Commissioner Glassie: Do you wish them to be given evidential value?

Mr. De Vries: As information, yes.

Commissioner Glassie: You say they are supposed to have a probative force.

Mr. De Vries: Yes, they do.

Commissioner Glassie: In determining the action of the Commission?

Mr. De Vries: Prima facie so, Mr. Glassie; and if the Commission doubts them, of course the Commission can investigate them. I find a rule of the Commission to the effect that papers and documents submitted before this Commission as evidence may be investigated by the Commission, and probably will, as to the probative force. We find, in the other report that you have submitted to us in this case, as a statement of facts found, quotations from scientific journals and from newspapers and other sources of information which the Commission submits as evidence taken before it or information gathered in its investigation. Those things can be replied to by information of equal solemnity, which the Commission has a right to take into consideration, giving them such weight as they see fit, and if they doubt them, they can investigate the authenticity, which is pointed to in the documents themselves.

Commissioner Glassie: It is in the nature of new matter, however, and it is not merely argument on a closed record.

Mr. De Vries: They are both united in one, for the convenience of the Commission, Mr. Glassie.

Commissioner Burgess: Is your material in such shape that you could present it to the other side before Monday? I refer to your manuscript.

Mr. De Vries: It is a question of printing, Mr. Burgess.

Commissioner Burgess: I mean in manuscript form.

Mr. De Vries: No; most of it is in the hands of the printer now.

Commissioner Burgess: You have not any duplicate copies which could be handed to the other side?

Mr. De Vries: No, sir. I think Senator McCumber's request to examine these matters in ample time to reply is the right thing under the circumstances. That is the orderly procedure, that either party have ample time to consider what is submitted against it and to answer it, and ample and full time to reply. For that reason I made the point before, and I renew it now, that the few days that were allowed us, six or seven days, are not a reasonable time in which to gather information from Norway and from Seattle in any form of solemnity which should be submitted to a court, or for examination by us and segregation for presentation to this Commission. But we have

done our best, and we think we have something that the Commission would be very glad to see. For the convenience of the Commission and all parties we are printing every bit of it in sufficient numbers so that it may be examined by the Commission and by the other parties to this proceeding. The printing of it will be completed on Monday.

Mr. McCumber: Mr. Chairman, may I be heard upon this one feature of the case?

About one year ago the parties in interest knew of this proceeding. They have had a whole year in which to present anything they thought was pertinent to the question of cost of production of this article in Norway. As we understand the duty of the Commission, it is to carry out the intent and the purpose of the law and its policy. One of the policies of the law there was the protection of American industries. It makes little difference whether we agree with that policy or not, but that is declared to be the policy of the law, to protect the American industries that they may be maintained in this country.

It is hardly in line with protection that a languishing concern, and one which is finally compelled to temporarily close its doors, should be prejudiced by the practice of continuing cases, and opening and reopening cases for a whole year, until the patient dies. That is hardly in accordance with the purpose of the law itself, and it seems to me unfair to allow the matter to drag along.

Of course, it is to the interest of the importer that it should be dragged along. It is in the interest of the purchaser from that importer that it should be dragged as long as possible, and to the final end that the American manufacturer may cease to be a menace to his business in the United States.

If I understand the purpose of the law and the creation of the Commission, it is to prevent just that thing from being done, whether it is done by methods of delay or whether it be done by reason of the under-selling in the United States for any particular length of time.

The Chairman: Mr. McCumber, the request, as we understand it, is not to reopen the case, but for reasonable time to present evidence which they have gathered or are in the process of gathering, evidence that bears directly

upon the issue in this case, that is, the cost of production here and abroad. The point is, has the Commission given reasonable time for the preparation and presentation of that evidence? Request is now made, as we understand it, for a continuance of the hearing at least until Monday, in order that the evidence that has been prepared and the brief that has been prepared may be obtained from the printer and presented in due form to the Commission. Would you direct your remarks to that phase of the request, and then, anything that you have to say in regard to the procedure of the Commission in connection with this particular investigation, we will be glad to hear.

Mr. McCumber: Mr. Chairman, reasoning from analogy, I would suppose that when the judge of a court directs counsel for the respective parties to proceed with their argument, and they do proceed, and close that argument, after that argument has been made, if the court should then say "We will allow either party to produce further evidence," that would be a reopening of the case, and I use the words "reopening of the case" in that respect.

I think it is unfair to us, both from the standpoint of the long delay that has already been had in this case, and also from the standpoint of compelling us to go into the matter again, to retry any matter, on any evidence that the parties in interest have had a whole year to present. That is the injustice in the matter.

Of course, we must submit to any ruling that the Commission sees fit to make, but I think we have a right to call the attention of the Commission to the fact that, of course, if other evidence is produced, on Monday, if it is something that has taken a long time to have printed, it will take us some time to read it. It will take us another long time to refute it, if there is anything to refute it; and then if there is new matter brought out, of course we shall have to make a further argument. That seems to us to be very unjust in the matter. I appreciate that the Commission is trying to give every party every possible means of assisting the Commission in securing data on which it is to report to the President, but I think that it has gone further than it should go in attempting to reopen the case again after this long period of discussion.

Commissioner Costigan: Senator McCumber, what bearing on the argument would the suggestion in his brief that

this is not a judicial body have? In other words, in your opinion, should a non-judicial body investigate with greater latitude, or with more definite restrictions than those ordinarily imposed by the courts?

Mr. McCumber: I will admit that it should have greater latitude, and that its methods should not be analogous to those of a court, and for that reason I deny the right of any party under the law to call and cross-examine witness, to do anything, or to follow any code of procedure that they would follow before a judicial tribunal.

I insist that the law does not contemplate that kind of a hearing, and if that kind of a hearing is given, when you get thirty or forty or fifty or a hundred cases of this kind before the Commission, you have destroyed the Commission's ability to handle the cases at all, and no relief can be obtained.

I want to be heard further upon those questions of what should be the procedure in a case of this kind.

Commissioner Lewis: I am sure the Commission will hear you upon this subject, Senator, with the greatest of interest, if only because of your relation to the subject. It is apparent that you have been giving it some thought, and I think discussion would be helpful.

Mr. McCumber: I might say that there might be others that could present the matter more lucidly and carefully than I could myself; but I think that I have some suggestions that might be helpful. However, I desire to allow the Commission to determine that for themselves.

Commissioner Glassie: Senator, I understood the Chairman to rule that you might proceed with the discussion of procedure in its general application to this case, and I was rather expecting that you would do so. I thought we were all agreed as to that.

The Chairman: Opportunity was afforded to Senator McCumber, with, of course, the understanding that Judge De Vries has an opportunity to meet any suggestion that he makes here.

Mr. De Vries: Just at this juncture I want to make one suggestion, Mr. Chairman, in reply to some of the things Senator McCumber has said.

So far as the protection of the interests of American manufacturers is concerned, I do not think I have to say

in this presence my line of thought in that connection, but I want to say that the importing interests in this country have also a great interest, and they are entitled to equal consideration before this Commission with the American producing interests in determining the rates of duty.

My thought in that connection is not a political thought, but it is the thought that is based upon the provisions of this Act and that the rights which we are here seeking are founded in the statute and not in political views upon the subject of American producers and importers.

The statute, which it may be well to read at this juncture, provides that investigations to assist the President in ascertaining differences in costs of production under this Section shall be made by the United States Tariff Commission, and no proclamation shall be issued under this section until such investigation shall have been made. The Commission shall give reasonable public notice of its hearings, shall give reasonable opportunities to parties interested to be present, to produce evidence and to be heard.

The Commission is authorized to adopt rules. Of course, that provision is familiar to all of us here, but, let us apply it to the facts in this case.

It has been suggested that this case has been pending for one year. That is true, but the interested parties in opposition did not know what case was being prepared. It has taken the Government investigators, most capable men, one year to find the facts that are presented to us to be answered in eight days. The petitioner itself had to file three petitions before he finally settled down to the particular case, and if we are correctly informed of the case here, piece by piece, and the testimony taken in this record, the case he finally rests upon after a year's deliberation and consideration is a vastly different case from the case he presented a year ago.

In view of those facts, and the fact that we must go abroad and to the far side of this continent to gather our information, we respectfully suggest that the statute, which gives us the right to be present and to be heard, which the decisions hold means to be heard upon every particle of evidence produced in the case that is not a trade secret or practice, entitles us to more than eight or

ten days to examine and be heard upon the product of the thought of the best minds of the country for a year.

* * * * * * *

[Here followed legal argument by McCumber, Sullivan, and De Vries.]

The Chairman: If the observations on the procedure of the Commission are completed——

Mr. Sullivan: Mr. Chairman, may I make one statement before adjournment and the closing of the case?

With reference directly to this case, we contend that the findings of this Commission issued on the 15th of September were erroneously issued and erroneously published under the interpretation which we take of the law. That being so, we direct our objection to the introduction of any further testimony on account of this publication of the findings of the Commission, and we ask that the case be considered closed as of September 26, the date when the briefs were filed, or that it be closed as of today upon the filing of briefs and arguments without any further testimony.

The Chairman: The hearing, of course, cannot be regarded as closed as of September 26th because we set this date for the purpose of filing briefs or presenting evidence in connection with the summary of information in the possession of the Commission that was supplied to counsel on each side, and also for the purpose of presenting the final arguments. Counsel for the Norwegian Nitrogent Products Company has asked for an extension to Monday for the purpose of filing his brief. The Commission grants the request for an extension of time for the purpose of filing the brief until Monday and extends to the counsel on the other side the privilege, for a period of ten days, or to October 17th, of considering the brief and filing with the Commission an answer if it desires to do so.

Mr. De Vries: Do I understand I am not to include in that brief the documentary evidence which I have spoken of?

The Chairman: You are permitted to include in the brief the documentary evidence.

Mr. De Vries: Thank you.

Mr. McCumber: May we suggest that it is possible that we may not want that length of time, and we can only determine that after we have seen counsel's brief and after we have read over the testimony, and I would not wish the Commission to set a date which we might not call for, and I would ask the Commission not to fix that date until we have an opportunity—that is, a final date—to determine how much time will be necessary, until the Commission may be informed. Possibly after we have examined the testimony we can inform the Commission the number of days that will be required, and it may not require that length of time. We are very much interested in closing the case as soon as possible.

The Chairman: We extend to you the privilege to October 17th of filing your answer to the brief.

Mr. De Vries: What time on Monday do we have? The printers will not work on Sunday. If you make it 10 o'clock Tuesday morning it will be just the same. It will be served and filed before then and we will have Monday night to print it.

The Chairman: That will be agreeable.

Mr. De Vries: It will be simply the filing of the brief.

The Chairman: It will be 10 o'clock Tuesday morning. Have the counsel arguments to present in this case?

Mr. De Vries: We shall have none other than in the brief.

The Chairman: Has counsel for the American Nitrogen Products Company?

Mr. McCumber: We have one little additional argument which has been prepared by Mr. Sullivan covering questions which I did not cover exclusively in my argument or in the brief which I prepared. It is simply in typewritten form and is very short, and if there is no objection, we ask that it simply be taken by the reporter and inserted as a part of the record.

Mr. De Vries: There is no objection at all to Senator McCumber's argument on the construction of the Act at any time.

* * * * * * *

The Chairman: Are there any other persons present who desire to be heard or to present argument in this case?

(No response.)

The Chairman: If not, the hearings in connection with the investigation concerning the cost of production of sodium nitrite are closed.

(Thereupon, at 12:40 o'clock p. m., the hearings were closed.)

Exhibit 8.

Indorsed: U. S. Customs Court. Exhibit 8. No. 92852-G. Date: 11/24, 1930. S. C. H., Reporter.

Brief re Customs Duty Increase on the Chemical Sodium Nitrite, Submitted to the United States Tariff Commission by the American Nitrogen Products Company, Seattle, Washington, October 24, 1922.

SEATTLE, WASH., October 24, 1922.

United States Tariff Commission,
Washington, D. C.

GENTLEMEN:

Sodium Nitrite.

1. Due to foreign competition, mainly German, Swiss, and Norwegian, this Company's air nitrate plant located at La Grande, Washington, was closed April 1, 1921, and has remained closed ever since. This plant manufactures exclusively sodium nitrite and its very life is therefore dependent on this product and it alone. Any change in plant or processes would be prohibitively expensive. It must remain a sodium nitrite plant. This plant is the largest producer of sodium nitrite in this country. It is the only plant of its kind on the American Continent, employing what is known as the electric arc method of air nitrogen fixation. Because of this fact its existence and maintenance is of vast interest and importance to the United States Government which has time and again gone on record as favoring the investigation,

development, and fostering of the various nitrogen fixation methods in this country. As a case in point we mention the expenditure at Muscle Shoals of $105,000,000 by Congress in the building of air nitrate plants. Our plant was built in 1917 and involves an expenditure of $250,000 all of which is private capital. Only a depletion of the huge stocks of foreign nitrite imported into this country prior to the embargo taking effect, and a reasonable future sales price, can maintain this plant. The stocks are gradually being depleted but the destructive competition of the large foreign air nitrate works still exists in spite of the three (3) cent duty as proven in the next paragraph. These large foreign air nitrate works manufacture sodium nitrite as a by-product and can therefore dispose of it very cheaply. They are, of course, also enormously benefited by the disparity in foreign exchange. A reasonable sales price is between nine (9) and ten (10) cents per pound f. o. b. consumers works.

* * * (Confidential portions omitted.) * * * In the hope of better business to come, we are endeavoring to resume operations. However, we were informed later that the importers offered to go as low as seven and one-half (7½) cents per pound, all charges and duty paid, in order to secure the business. It is reasonable to suppose that even this price will be lowered in the future if such action becomes necessary to secure the trade. But even on the seven and one-half (7½) cents per pound delivered price basis the addition of an extra fifty (50) per cent of duty or one and one-half cents per pound will fix the price of foreign nitrite in this country at nine (9) cents per pound. If we are forced below this figure permanently it will not allow us a reasonable margin of profit as clearly proven in next paragraph. * * * (Confidential portions omitted.) * * *

3. Our costs are shown below. We invite particular attention to the fact that our far western location does not adversely affect our delivered costs because of special low commodity freight rates granted us as an encouragement to the industry. Any raw materials used are also obtained very cheaply. Overhead, salaries, and other charges are also kept at a minimum. For instance, the highest salary paid any official is only $500 per month. This is the president and general manager of the company. It is merely

nominal and proves our economies in endeavoring to establish the business. We, therefore, consider our costs fair, reasonable, and competitive, in so far as domestic manufacture is concerned. It is the best that can be done with a relatively small plant and until the industry is developed and established on a larger scale. This we are endeavoring to do and when such expansion has taken place and costs have been reduced, this company shall be only too glad to give the consumers the benefit of same and the President may then reduce the duty. In the meantime, however, we need the added protection very badly indeed.

* * * (Confidential portions omitted.) * * *

4. The profit assumed above of 1.2¢ per pound equals $24.00 per ton which, on 100 tons monthly production, is $2400 or $28,800 per year. Our outstanding capital stock, fully paid up, is $1,229,500. The above profit is, therefore, merely nominal and would be entirely inadequate for a dividend. It is in the hope of expansion and fair profits to come in the future that this corporation is heroically continuing its efforts to put the business on its feet in this country. In the meantime, however, we must at least exist. It is certain that a total duty of at least four and one-half (4½) cents per pound is necessary to insure this. Only two dividends on the capital stock of this company have been paid and then only on the preferred stock. This was during the war years, 1917 and 1918. The net earnings since then have been insufficient to take care of dividends.

5. We call your attention to the fact that market quotations as given on imported sodium nitrite as printed in the chemical journals always considerably exceed the *inside* prices quoted on bona fide contract competitive basis. It is only through a competitive case such as cited in paragraph 2 of this letter that the *real* price is disclosed. Such inside price quotations are seldom transmitted in writing. They are generally handled verbally.

6. Attached hereto please find photograph of the plant.

7. In view of all the above we respectfully request an

early report and recommendation to the President that the duty on sodium nitrite be increased fifty (50) per cent.

Very truly yours,

AMERICAN NITROGEN PRODUCTS COMPANY,

(Signed) By C. F. GRAFF, *Pres.,*
President and General Manager.

LAK.
Incl. 1.

Exhibit 9.

United States Tariff Commission, 8th and E Streets N. W., Washington.

Thomas O. Marvin, Chairman; William S. Culbertson, Vice-Chairman; David J. Lewis, Edward P. Costigan, William Burgess, Henry H. Glassie. John F. Bethune, Secretary.

Address reply to United States Tariff Commission.
File No. —.

Summary of Information in the Matter of Sodium Nitrite, the Subject of Public Hearing, September 10, 1923, with Letter of Transmittal to Appellant September 15, 1923.

September 15, 1923.

De Vries and Doherty,
Counsellors-at-Law,
Southern Building,
Washington, D. C.

DEAR SIRS:

Herewith please find inclosed summary of information compiled by the Tariff Commission in connection with the pending investigation of costs of production of sodium nitrite, for the purposes of Section 315, Title III, of the Tariff Act of 1922.

Very truly yours,

JOHN F. BETHUNE,
Secretary.

Inclosure.

Indorsed: U. S. Customs Court. Exhibit 9. Prot. No. 92852-G. Date: 11/24, 1930. S. C. H., Reporter.

United States Tariff Commission.

A Summary of Information in the Matter of Sodium Nitrite, the Subject of a Public Hearing, September 10, 1923.

This Summary is information obtained from the public hearing, from publications, correspondence on file in this office, questionnaires sent to manufacturers, and inspection of books and factories of manufacturers by representatives of the Commission, and interviews with persons having personal knowledge of this industry.

All information in regard to costs of manufacture of individual firms and other information in the nature of trade secrets or processes has been eliminated from this Summary, as required by section 708 of the Revenue Act of 1916, the pertinent provisions of which are as follows:

Sec. 708. "It shall be unlawful for any member of the United States Tariff Commission or for any employee, agent, or clerk of such commission, or any other officer or employee of the United States, to divulge or make known in any manner whatever not provided for by law, to any person, the trade secrets, or processes of any person, firm, copartnership, corporation or association, embraced in any examination or investigation conducted by said commission or by order of said commission; or by order of any member thereof. * * *"

An opportunity will be given for argument on the record on September 26, 1923, at 10:00 a. m., in the office of the United States Tariff Commission.

An application from the American Nitrogen Products Company requests an increase in duty from 3 cents per pound to 4½ cents per pound.

This application reads as follows:

(Copy.)

SEATTLE, WASH., October 24, 1922.

United States Tariff Commission,
Washington, D. C.

GENTLEMEN:

Sodium Nitrite.

1. Due to foreign competition, mainly German, Swiss, and Norwegian, this Company's air nitrate plant located at La Grande, Washington, was closed April 1, 1921, and has remained closed ever since. This plant manufactures exclusively sodium nitrite and its very life is therefore dependent on this product and it alone. Any change in plant or processes would be prohibitively expensive. It must remain a sodium nitrite plant. This plant is the largest producer of sodium nitrite in this country. It is the only plant of its kind on the American Continent, employing what is known as the electric arc method of air nitrogen fixation. Because of this fact its existence and maintenance is of vast interest and importance to the United States Government which has time and again gone on record as favoring the investigation, development, and fostering of the various nitrogen fixation methods in this country. As a case in point we mention the expenditure at Muscle Shoals of $105,000,000 by Congress in the building of air nitrate plants. Our plant was built in 1917 and involves an expenditure of $250,000, all of which is private capital. Only a depletion of the huge stocks of foreign nitrite imported into this country prior to the embargo taking effect, and a reasonable future sales price, can maintain this plant. The stocks are gradually being depleted but the destructive competition of the large foreign air nitrate works still exists in spite of the three (3) cent duty as proven in the next paragraph. These large foreign air nitrate works manufacture sodium nitrite as a by-product and can therefore dispose of it very cheaply. They are, of course, also enormously benefited by the disparity in foreign exchange. A reasonable sales price is between nine (9) and ten (10) cents per pound f. o. b. consumer's works.

* * * (Confidential portions omitted.) * * * In the hope of better business to come, we are endeavoring to resume operations. However, we were informed later that the importers offered to go as low as seven and one-half (7½) cents per pound, all charges and duty paid, in order to secure the business. It is reasonable to suppose that even this price will be lowered in the future if such action becomes necessary to secure the trade. But even on the seven and one-half (7½) cents per pound delivered price basis the addition of an extra fifty (50) per cent of duty or one and one-half cents per pound will fix the price of foreign nitrite in this country at nine (9) cents per pound. If we are forced below this figure permanently it will not allow us a reasonable margin of profit as clearly proven in next paragraph. * * * (Confidential portions omitted) * * *.

3. Our costs are shown below. We invite particular attention to the fact that our far western location does not adversely effect our delivered costs because of special low commodity freight rates granted us as an encouragement to the industry. Any raw materials used are also obtained very cheaply. Overhead, salaries, and other charges are also kept at a minimum. For instance, the highest salary paid any official is only $500 per month. This is the president and general manager of the company. It is merely nominal and proves our economics in endeavoring to establish the business. We, therefore, consider our costs fair, reasonable, and competitive, in so far as domestic manufacture is concerned. It is the best that can be done with a relatively small plant and until the industry is developed and established on a larger scale. This we are endeavoring to do and when such expansion has taken place and costs have been reduced, this company shall be only too glad to give the consumers the benefit of same and the President may then reduce the duty. In the meantime, however, we need the added protection very badly indeed.

* * * (Confidential portions omitted.) * * *

4. The profit assumed above of 1.2¢ per pound equals $24.00 per ton which, on 100 tons monthly production, is $2400 or $28,800 per year. Our outstanding capital stock,

fully paid up, is $1,229,500. The above profit is, therefore, merely nominal and would be entirely inadequate for a dividend. It is in the hope of expansion and fair profits to come in the future that this corporation is heroically continuing its efforts to put the business on its feet in this country. In the meantime, however, we must at least exist. It is certain that a total duty of at least four and one-half (4½) cents per pound is necessary to insure this. Only two dividends on the capital stock of this company have been paid and then only on the preferred stock. This was during the war years, 1917 and 1918. The net earnings since then have been insufficient to take care of dividends.

5. We call your attention to the fact that market quotations as given on imported sodium nitrite as printed in the chemical journals always considerably exceed the *inside* prices quoted on bona fide contract competitive basis. It is only through a competitive case such as cited in paragraph 2 of this letter that the *real* price is disclosed. Such inside price quotations are seldom transmitted in writing. They are generally handled verbally.

6. Attached hereto please find photograph of the plant.

7. In view of all the above we respectfully request an early report and recommendation to the President that the duty on sodium nitrite be increased fifty (50) per cent.

Very truly yours,

AMERICAN NITROGEN PRODUCTS COMPANY,

(Signed) By C. F. GRAFF, *Pres.*,
President and General Manager.

LAK.
Incl. 1.

Summary of Information on Sodium Nitrite.

United States Tariff Commission.

Rates of Duty.

Act of 1922—3 cents per pound.
Act of 1921—Embargo (May 27, 1921, to Sept. 21, 1922).
Act of 1913—½ cent per pound.
Act of 1909—2 cents per pound.

Uses of the Article.

Sodium Nitrite is used chiefly in the manufacture of "Azo" dyes. This class of dyes represents over 40 per cent of the total domestic output. It also has minor laboratory and pharmaceutical uses.

Raw Materials and Sources Thereof.

There are three processes in use for the manufacture of sodium nitrite, viz:

1) *Arc Process.*—By this process nitrogen of the air is converted by an electric arc into oxides of nitrogen which are absorbed in soda ash to produce sodium nitrite. The commercial production of sodium nitrite by this process requires that power be available at a comparatively low rate.

2) *Ammonia-Oxidation Process.*—Ammonia is converted to oxides of nitrogen by passing it through a heated platinum gauze. The oxides of nitrogen are converted into sodium nitrite as given above.

3) *Sodium Nitrate Process.*—By this method sodium nitrate (Chilean nitrate) is reduced by means of lead to sodium nitrite with the simultaneous formation of litharge.

Soda ash is an important material for the manufacture of sodium nitrite by both the arc process and the ammonia-oxidation process. The domestic price on September 10, 1923, for contracts was $1.45 per 100 pounds in bags at makers' works.

Domestic Production.

Significant History.—Prior to the war sodium nitrite was not made to any extent in this country. What was made was produced by the sodium nitrate process. During the war the development of the dye industry caused a heavy demand and considerable sodium nitrite was produced by the arc process and by the ammonia-oxidation method.

Manufacturers and Geographical Distribution.—The two principal producers of sodium nitrite are the Semet-Solvay

Co. of Syracuse, N. Y., which firm uses the ammonia-oxidation process, and the American Nitrogen Products Co., Seattle, Washington, operating the arc process. The only other producer, the Harshaw, Fuller and Goodwin Co., of Cleveland, Ohio, makes a smaller quantity of sodium nitrite by the sodium nitrate process.

Production and Consumption.—The estimated normal consumption of sodium nitrite in the United States is about 6,000,000 pounds per year. From evidence submitted, domestic producers have plant capacities equal to about 87% of these requirements.

TABLE 1.—*Domestic Production of Sodium Nitrite.*[1]

Year.	Pounds.	Value.	Unit value, cents per pound.
1917	1,722,000	$480,145	27.85
1918	3,402,000	609,779	17.90
1919	2,364,000	265,121	11.21
1920	2,394,000	405,184	16.92

[1] From Mineral Resources of the United States Geological Survey.

Imports.

Norway and Germany supply most of the sodium nitrite imported. Imports from 1914 to 1921 have varied from 1¾ to 3½ million pounds with the exception of the year 1920, when 11,690,000 pounds were brought in. This very large importation was probably about 25% in excess of the domestic requirements of the abnormally large output of dyes in that year. On an average about 50% of the demand for sodium nitrite in the United States has been supplied by imports. During the 4th quarter of 1922, 1,460,528 pounds of sodium nitrite were imported at an average declared value of 4 cents per pound. During the first 6 months of 1923, 3,647,125 pounds of sodium nitrite were imported at an average declared value of 4.4 cents per pound.

TABLE 2.—*Sodium Nitrite Imported Into the United States for Consumption, 1908–1923.*

Fiscal year.	Quantity pounds.	Value.	Unit value, per pound.	Computed ad valorem rate per cent.
1908	199,857	$10,015	$0.050	49.91
1909	152,393	7,258	.048	52.49
1910 [1]	24	4	.167	.....
1910 [2]	1,132,754	52,233	.046	43.37
1911	477,707	21,205	.044	45.06
1912	974,667	47,399	.049	41.13
1913	1,269,544	57,595	.045	44.09
1914 [3]	153,143	7,447	.049	41.13
1914 [4]	1,691,236	69,366	.041	12.19
1915	1,696,567	74,267	.043	11.42
1916	2,593,330	170,160	.065	7.62
1917	3,675,179	261,655	.071	7.02
1918	2,755,033	248,294	.090	6.09
Calendar year:				
1919	2,550,689	246,729	.0967	5.17
1920	11,690,142	1,378,992	.1180	4.24
1921	3,174,642	238,083	.0750	6.67
1922 [5]	1,000	209	.2090	2.39
1922 [6]	1,460,528	58,093	.0398	75.42
1923 (6 months) [7]	3,647,125	160,238	.0439	68.2

[1] Act of 1897, July 1, 1909, to August 5, 1909.
[2] Act of 1909, August 6, 1909, to June 30, 1910.
[3] Act of 1909, July 1, 1913, to October 3, 1914.
[4] Act of 1913, October 4, 1913, to June 30, 1914.
[5] Act of 1913, January 1, 1922, to September 21, 1922.
[6] Act of 1922, September 22, 1922, to December 31, 1922.
[7] General Imports.

The exports of sodium nitrite from Norway to the United States during March, April, and May, 1923, were 1,073,000 pounds; the average invoice value was 4.84 cents per pound c. i. f. New York. Included in this price are the following charges:

	Per 100 pounds.
Packing	$0.204
Inland freight	.026
Ocean freight and insurance	.273
Total	$0.503

Deducting these charges, the average price received at the factory in Norway was 4.34 cents per pound.

Exports.

Sodium nitrite has not been exported from the United States in appreciable quantities.

Foreign Production.

The Norsk Hydro-Elektrisk Kvaelstofaktieselskap of Norway, and the Badische-Anilin and Soda Fabrik of Germany, are the largest foreign producers of sodium nitrite. The Norsk-Hydro has an annual capacity for sodium nitrite of some 24,000,000 pounds. This compay uses the arc process. The output of the Badische company is large but figures are not avaliable. This company fixes nitrogen by the Haber ammonia process. The ammonia is converted chiefly into nitric acid and nitrates; sodium nitrite is also obtained in the process as a minor product.

At the Norsk Hydro plant sodium nitrite together with sodium nitrate are manufactured in connection with the production of calcium nitrate, which is used as a fertilizer. The relative production of the three products is shown in the following table which gives the daily capacity of the principal plant of Norsk Hydro.

	Daily capacity.	
	Metric tons.	Short tons.
Calcium Nitrate	400	441
Sodium Nitrate	40	44
Sodium Nitrite	30	33

The production of sodium nitrite in Germany is also a minor product compared with other products made in the same plant.

The situation in the United States is quite different. Sodium nitrite is the only product made by the American Nitrogen Products Company, and the production of this commodity by the Semet-Solvay Company represents an independent unit of their plant. This latter company and associated companies, however, make many other important chemicals, including the raw materials necessary for the manufacture of sodium nitrite by the ammonia oxidation process, namely, ammonia and soda ash.

Production Costs.

Domestic costs of production for sodium nitrite were secured from The American Nitrogen Products Co., and the Semet-Solvay Co. These costs are not published by the

Commission, as they are claimed by domestic manufacturers to be "trade secrets" within the meaning of section 708 of the Revenue Act of 1916.

Both the Norsk Hydro of Norway and the Badische Anilin of Germany refused to give investigators of the Tariff Commission access to their cost records relating to sodium nitrite.

Estimate of Norwegian Costs.—In the case of Norway, information was obtained from other sources as to power costs, prices of soda ash, wage rates and other factors relating to production costs. From such information the Tariff Commission has prepared the following tentative estimate of producing sodium nitrite in Norway:

TABLE 3.—*Estimate of Sodium Nitrite Costs in Norway.*

	Kroners per short ton.	Converted cost per 100 pounds.	
		Current exchange.[1]	Par exchange.[2]
Power—2 H. P. years, at 20 kroners...	40.0	$0.333	$0.50
Soda Ash—1 ton at 130 kroners	130.0	1.083	1.625
Labor (estimated at 6% of total labor of plant).....	26.2	.218	.327
Subtotal.....	196.2	1.634	2.452
Total Cost (estimated on basis that power, soda ash and labor are 75% of total cost).....	262.0	2.183	3.275

[1] Converted at 6 kroners to the dollar.
[2] Converted at 4 kroners to the dollar.

Power concessions granted by the Norwegian Government under the Water Power Concession Act show that power has been contracted for as follows:

1). Porsgrund Elektrometallurgiske Aktieselskap at Porsgrund have contracted for 6,000 H. P. at 32 kroners per H. P. year and an additional 4,000 H. P. at 30 kroners.

2). Electro Furnace Products Co., Ltd., at Sauda have contracted for 40,000 H. P. at 32 kroners per H. P. year and have an option on an additional 40,000 H. P. at the same rate.

An article published in Teknish Ukeblad April 23, 1915, page 229 shows that the larger part of the power in Norway has been developed between 120 and 180 kroners per horse power. 300,000 H. P. at Rjukan at a cost of 180 kroners

would represent an investment of 54,000,000 kroners. The total investment at Rjukan, including power developments and chemical plants, as published in the 1922 financial statement of the Norsk Hydro, is about 66,000,000 kroners.

A sales price for power of 18 kroners per H. P. year would yield a 10 per cent return on the original cost of development. In the estimate given above, however, 20 kroners per H. P. year has been taken as an average price for power.

Information was obtained that the cost of soda ash in Norway was from 130 to 140 kroners *per metric ton.* The cost of soda ash has been taken as 130 kroners *per short ton.* Slightly less than one ton of soda ash is required for each ton of sodium nitrite produced.

The basic wage rate in the electro chemical industry is from 1.50 kroner to 1.80 kroner per hour, which rate applies in the plants of the Norsk Hydro. Additions to this rate such as vacation period (2 weeks) with pay make an average wage rate of about 2.0 kroners per hour. From this information and the number of employes the cost of labor has been estimated. Labor is a minor item of costs as the process used in Norway is continuous and automatic to a large extent.

Prices.

Prices in Germany.—Prices at which sodium nitrite was sold in Germany for home consumption were obtained from the Badische Anilin and Soda Fabrik. These prices naturally represent a profit, as this firm is the only producer and has no competition in the German market. The following prices are for sodium nitrite at makers' works unpacked:

Paper marks per Kilo.		Dollars converted at current exchange.
Jan. 1, 1922	12.0	$0.029 per pound.
Apr. 1, 1922	18.5	.028 " "
July 1, 1922	23.0	.026 " "
Oct. 1, 1922	82.0	.021 " "
July 1, 1923	0.40 Gold Marks.	.0433 " "

Tables 4 and 5 give domestic and foreign prices of sodium nitrite.

From a prewar price of about 5 to 6 cents per pound, the price rose steadily to 44 cents in October, 1917. From then

on it fell to 32 cents in October, 1918, and to 11 cents in October, 1919. It is *significant* that in 1918 American production attained its maximum. The 1920 minimum price was 13 cents, maximum 30 cents; 1921 showed 6 to 10 cents; 1922, 6 cents in January and 10 cents in October. During 1923 the price has dropped from 10 in January to 7½ in September. Foreign nitrite was quoted at 7½ cents in September.

TABLE 4.—*Spot Prices of Sodium Nitrite, New York Market*, 1915–1921.

(From Oil, Paint, & Drug Reporter.)

	1915	1916	1917	1918	1919	1920	1921
			Cents per pound.				
January	.....	18–21	18–21	40–43	19–20	13–14	6½– 7
April	7¼– 7½	18–21	18–22	36–37	14–15	24–30	6 – 7
July	18 –21	18–21	32–38	32–33	11–12	15–15½	7¼–10
October	18 –21	18–21	42–44	32–33	11–12	13–13½	6¾–10

TABLE 5.—*Prices of Sodium Nitrite, New York, Manchester, and Paris Markets, 1922 and 1923.*

(Per pound.)

	1922			
	New York.		Manchester (a).	Paris (b).
	Domestic.	Imported.		
January	$0.06 –.07	.....	$0.0620	$0.1271
February	.07 –.07½	.....	.0612	.1322
March	.08 –.08½	.....	.0614	.1042
April	.08 –.10	.....	.0586	.1020
May	.08½–.10	.....	.0594	.0939
June	.08½–.10	.....	.0597	.0926
July	.08½–.09½	.....	.0612	.0855
August	.09 –.09½	$0.07½–.08	.0614	.0832
September	.09 –.09½	.07¾–.08	.0578	.0732
October	.09½–.10	.09½–.10	.0548	.0691
November	.10	.08¼–.08½	.0537	.0717
December	.10	.08 –.08½	.0544	.0705
	1923			
January	$0.10	$0.08 –.08½	$0.0560	$0.0622
February	.10	.08½–.08¾	.0562	.0497
March	.10 –.10½	.08¼–.09	.0588	.0510
April	.10 –.10½	.08¼–.09	.0563	.0558
May	.10 –.10½	.08 –.08¼	.0559	.0565
June	.08¼–.08½	.08 –.08¼	.0557	.0543
July	.07¼–.07½	.07¾–.08	.0551	.0496
August	.07¼–.07½	.07½–.08	.....	.....

(a) From Chemical Trade Journal, London.
(b) From LaRevue des Produits Chimiques, Paris.

Competitive Situation.

Power Costs and Efficiency.—Information obtained by the Commission's investigators tends to show that the cost of power in Norway is considerably less than the price which the American Nitrogen Products Company pays for power.

In regard to power consumed per unit of nitrogen fixed, information obtained from the American firm when compared with estimates of power consumption in the Norwegian plant tends to show that the American firm produces less nitrogen per unit of power than is produced in Norway.

Capital Invested.—Information obtained as to capital investment when compared with capacities tends to show that the investment per unit of nitrogen fixed in the case of the American producer for the sodium nitrite plant alone is considerably greater than the unit investment of the Norwegian producer for both sodium nitrite plant and power plant.

Transportation.—The principal market for sodium nitrite is along the Atlantic Coast; especially the district adjacent to New York City. The freight rate to this market from the plant of the American Nitrogen Products Company is $0.85 per 100 pounds and from the plant of the Semet-Solvay Company $0.34 per 100 pounds. The combined inland and ocean freight plus insurance from the plants of the Norsk-Hydro Company to New York is $0.30 per 100 pounds.

Freight charges on soda ash, the principal raw material, to the plant of the American Nitrogen Products Company at La Grande, Washington, are $0.84 and $1.35 per 100 pounds from the California and Detroit markets respectively. In the case of Norsk Hydro in Norway soda ash must be imported, principally from England.

Substitutes.—Sodium nitrite is indispensable in the manufacture of "Azo" dyes. No substitutes have been found.

Price vs. Quality.—The quality of the nitrite produced in various countries and by different processes is equal, so that from a quality standpoint there should be no price differences.

Exhibit 10.

United States Tariff Commission, 8th and E Streets N. W., Washington.

Thomas O. Marvin, Chairman; William S. Culbertson, Vice-Chairman; David J. Lewis, Edward P. Costigan, William Burgess, Henry H. Glassie. John F. Bethune, Secretary.

Address reply to United States Tariff Commission.
File No. —.

September 24, 1923.

Messrs. De Vries & Doherty,
Southern Building,
Washington, D. C.

GENTLEMEN:

Receipt is acknowledged of your communication of September 11, requesting permission to examine all data obtained by the Commission in its investigation respecting Sodium Nitrite.

Without going into the details with respect to the law or policy in general of revealing confidential information, the Commission calls attention to the fact that it has hitherto obtained its cost data under pledges of confidence, and it therefore cannot violate this pledge of its own motion.

Furthermore, the opposition to this application is not in a favorable position to demand cost data from the applicant because the Norwegian companies which control the Norwegian Nitrogen Products Company of New York, according to our information, have refused to give, even confidentially, cost of production data in Norway for Sodium Nitrite when requested to do so by agents of the Commission.

The Commission is informed that the American Nitrogen Products Company, the applicant in this case, agrees to disclose its cost of production data if the opposition, the Norwegian Nitrogen Products Company, will furnish cost data for the Norwegian product. So far as the Commission is informed up to the present time this offer has not been accepted.

Therefore it is deemed impracticable to grant your request that "every particle of evidence gathered by the Commission or its representatives" be disclosed to all interested parties.

Very truly yours,

THOMAS O. MARVIN,
Chairman.

Indorsed: U. S. Customs Court. Exhibit 10. Prot. No. 92852-G. Date: 11/24, 1930. S. C. H., Reporter.

Exhibit 11.

De Vries & Doherty, Counsellors-at-Law, Southern Building, Washington, D. C.

Telephone: Main 2688.

Marion De Vries, Thomas J. Doherty, George Roscoe Davis, George F. Lamb; George F. De Venny.

New York Office: 120 Broadway.

Indorsed: U. S. Customs Court. Exhibit 11. Prot. No. 92852-G, &c. Date: 11/24, 1930. S. C. H., Reporter.

September 11, 1923.

To the Honorable United States Tariff Commission,
Washington, D. C.

GENTLEMEN:

In support of the motion made by the undersigned at the hearing of the application of the American Nitrite Products Company for an increase of duty upon Sodium Nitrite before your Commission, September 10, 1923, that I be supplied with a complete copy of the petition submitted in behalf of the petitioner herein, in order that we might be "heard" thereupon, I beg to renew that request and that we be supplied all facts submitted to the Commission herein and to submit the following:

The law controlling the proceedings of the Tariff Commission in this particular is a part of Paragraph (c) Section 315 of the Tariff Act of 1922, reading:

"Investigations to assist the President in ascertaining differences in costs of production under this section shall be made by the United States Tariff Commission, and no proclamation shall be issued under this section until such investigation shall have been made. The Commission shall give reasonable public notice of its hearings and shall give reasonable opportunity to parties interested to be present, to produce evidence, and to be heard. The Commission is authorized to adopt such reasonable procedure, rules, and regulations as it may deem necessary."

Section 318, Subdivision (e) reading:

"The United States Tariff Commission is authorized to adopt an official seal, which shall be judicially noticed."

and Subdivision (f) of Section 318, which reads:

"Such attendance of witnesses and the production of such documentary evidence may be required from any place in the United States at any designated place of hearing. And in case of disobedience to a subpœna the commission may invoke the aid of any district or territorial court of the United States or the Supreme Court of the District of Columbia in requiring the attendance and testimony of witnesses and the production of documentary evidence, and such court within the jurisdiction of which such inquiry is carried on may in case of contumacy or refusal to obey a subpœna issued to any corporation or other person, issue an order requiring such corporation or other person to appear before the commission, or to produce documentary evidence if so ordered or to give evidence touching the matter in question; and any failure to obey such order of the court may be punished by such court as a contempt thereof."

It is obvious therefrom that the investigations by the Tariff Commission are judicial in nature; that the result of those investigations is "evidence", and that "parties interested" are entitled "to be present", "to be heard", as well as "to produce evidence".

Every statute should be read in the light of the public facts which lead to its enactment. Tariff investigations for the purpose of fixing duties previously had been conducted by the Finance Committee of the Senate and the Ways and Means Committee of the House. Witnesses appearing before these bodies were not sworn. The evidence collected by these committees, upon which duties were fixed, was unverified and in the form of letters received by mail, statements submitted by unsworn witnesses appearing before the committees, statements made to members of the committees and members of Congress, and by members of Congress, without sanctity of oath and without opportunity of interested parties in opposition thereto being heard. The experiences of all time have demonstrated that investigations of this character did not and could not elucidate the truth. The result was that rates of duty were fixed upon insufficient, incomplete and false statements. All men know that statements made by interested parties in matters wherein their financial interests are at stake can not be relied upon save when made under the sanctity of oath, with opportunity of cross-examination and elucidation. It was in this view that Section 315 was enacted. It was in this view particularly that the first above quoted paragraph was inserted as a part thereof. This paragraph, as it integrally shows, was calculated to require that the evidence upon which the Tariff Commission acted should be verified and taken after due notice to all interested parties who were entitled to be present, to produce evidence, and to be heard upon all the evidence produced and not upon a part of such evidence.

Owing to the broad scope of these investigations by the Tariff Commission they were empowered by the law to "Adopt such reasonable procedure, rules, and regulations as it may deem necessary." The broad interpretation of that sentence which is justified would empower the Tariff Commission to do all things necessary which would effect the results secured interested parties by the preceding provision.

The wisdom of this requirement was well demonstrated in the hearing of September the 10th. The parties appearing in opposition had been supplied but a part, and a very

minor part, of the petition and none of the evidence which had been submitted to the United States Tariff Commission in the pending case. The only relevant statement which was submitted to them upon the cost of production in the United States as a basis for their investigations and opposition was the statement in the petitioner's petition that "Our outstanding capital stock, *fully paid up* is $1,229,500. The above profit is therefore merely nominal and would be entirely inadequate for a dividend. It is in the hope of expansion, *and therefore profits to come in the future*, that this corporation is heroically continuing its efforts to put the business upon its feet in this country." Wherefore, of course, the opposition worked back from this statement to prove its falsity. The opposition was laboring entirely in the dark as to further and more complete statements made by the petitioner to the United States Tariff Commission. As a matter of fact, a representative of the Commission had gone to Seattle and procured an entirely different statement from the petitioner, and a representative of the Commission had gone abroad and secured statements as to cost of production of nitrite abroad. The opposition knew nothing of these statements. It was not furnished with any of the data thus produced before and upon the files of the Commission. They appeared totally in the dark as to the real case or actual facts which had been presented to the Commission by the petitioner. Wherefore, the presentation of the case of the opposition in the light of what it had been officially informed by the Commission was the case made by the petitioner and which it would have to meet, whereas in truth and fact the files of the Commission presented an entirely different case.

Now it is respectfully submitted that no such proceeding was contemplated by Congress, when it provided in the law that in the proceedings of the Tariff Commission interested parties could be present and heard. To be heard upon what? Upon a different case than that which had been presented by the petitioner? Upon but a fragmentary part of that which had been presented by the petitioner and gathered by the Tariff Commission? What do the words in the statute "to be heard" mean? Do they mean that interested parties are to appear before the

Tariff Commission and when they seek to be heard upon the case as submitted are told that that which they have appeared there to be heard upon has been submitted to the Tariff Commission without the sanctity of oath, without their being present, without being verified, and without any privilege of interested parties to be present when submitted or to examine the same. It is respectfully submitted that no such proceeding by the Tariff Commission can ever be justly sustained under the law controlling their investigations. Is testimony taken by a representative of the Commission in the private office of the petitioner in Seattle, without the sanctity of oath, without interested parties being present, such an investigation as is contemplated by the law which provides that such investigations must be upon due notice to interested parties at a time and place when they can be present and heard? Is it true that this requirement of the law permits of investigations abroad of cost of materials, and costs of labor and costs of power which are not given under oath, which are given out of the presence of interested parties, which are given without an opportunity to be heard to be used by the Commission without any opportunity at any time for the opposition to be present or to know of the same and to be heard thereupon?

Now, it is not here contended that the Tariff Commission must be curtailed in its investigations and hearings to such before the Board in open session, but it is insisted that every particle of evidence gathered by the Commission or its representatives should not be accepted by that Commission for its final action until the interested parties shall have an opportunity to be present at its offering or to examine the same and be heard thereupon and to offer evidence in contradiction thereof before judgment of the Commission is rendered thereupon.

That is the very thing which caused public sentiment in this country, and for which there is an overwhelming sentiment in this country, to transfer the making of our tariff rates from Congress into a judicial commission. One of the principal reasons moving this change of the law was that testimony given and accepted in the making of our tariff rates should be verified testimony submitted in the presence of all interested parties who should have a right

to be heard thereupon, and give evidence in contradiction thereof.

So, it is respectfully submitted that until this opportunity as to all evidence submitted, which is not "trade secrets", is afforded interested parties no valid findings by the Commission can be had.

As to what is a "trade secret", it is particularly appropriate to refer to the case in re Bolster, 110 Pacific Reporter, 547. The case arose in Seattle and was decided by the Supreme Court of the State of Washington. The syllabus truly interprets the decision. It states:

"The term 'trade secret' as usually understood means a secret formula or process, not patented, known only to certain individuals using it in compounding some article of trade having a commercial value, and does not denote the mere privacy with which an ordinary commercial business is carried on.

"The president of a corporation when required to appear and testify as a witness may not refuse to produce the record books of the corporation in response to a subpœna duces tecum because an examination of the books would infringe a right of privacy."

Now, it must be perfectly plain to all that costs of constructing a plant, that costs for the purchase of water power, that costs paid for a patent right, are not such trade secrets as are contemplated by the law and which are the only things in which a witness is protected as confidential in his business in a judicial investigation. If these things were confidential there never could be any investigation by this commission or by a court into "Cost of production". If this be true, inordinate profits could not be inquired into and profiteering would be protected by the law. It is respectfully submitted that any American producer or manufacturer who makes claim that Congress has erred in fixing a rate of duty as too low or when any importer claims that a rate of duty fixed is too high, they must come into court with clean hands, so to speak, with an open record, open not only to the commission but to cross-examination by those who in the business know the business, for it is the intent of the law that any inequality which he suffers will be mended by the commis-

sion and therefore an exposition of his disadvantages made known to the opposition will be cured by the commission.

It is respectfully submitted that until the proceedings are of this character by the Commission that the public will have no confidence in its findings. It has already been urged against this method that investigators who may be imposed upon are entirely probable, and that until the proceedings of the commission are fully and completely opened up to the public eye for examination by interested parties and until they are heard thereupon, as contemplated by the law, the public will have no confidence in but will be suspicious of the conclusions of the commission.

In this very case is demonstrated the wisdom of the Congress in requiring the proceedings of the Commission to be open. This petitioner appeared before the Ways and Means Committee, Tariff Information 1921, Part 1, Page 353, and following. He therein made the same statement that he in effect repeated before the commission on September 10th, as follows:

"When importation of dyestuffs into this country was cut off by the war, imports of nitrite of soda also ceased and our dye manufacturers found themselves without adequate supply."

He not only repeated that statement before the commission on September 10th, but emphasized the same to the extent that he claimed that his plant at Seattle had rescued the United States from this perilous position. The truth of the matter is that imports of nitrite during were greater than ever before the war; that the production of his plant was not one-sixth of the consumption of the United States during the war.

In the same statement before the Ways and Means Committee he stated: "To date we have invested something over three quarters of a million dollars." In his petition in this case before the commission he raised that amount to $1,229,500. We are advised, however, upon cross-examination, that he now reduces this amount to $250,000. Remember, this is an integral factor in the cost of production in the United States on which he has asked increase of this rate of duty to a prohibitive rate. We venture the

suggestion that when the figures constituting the $250,000 investment are exposed to examination, that they will be reduced to at least one-half of that amount!

This very case, therefore, emphasizes the wisdom of Congress in providing that evidence and testimony taken before the Tariff Commission should be under oath, should be in the presence of interested parties, who should have the right to "be heard" thereupon. It will savor, as was contemplated by Congress, of truthful facts being made the basis of our tariff data.

Now, it is respectfully suggested to the commission that it can provide reasonable rules whereby it can still avail itself of the efficiency of its many efficient agents in the field collecting testimony and data and of statements made under oath by the manufacturer or producer in his home, but that when collected before the commission the interested parties should be heard thereupon and have the right to cross-examine all witnesses, including field agents gathering this testimony as to its character and its reliability. The Board of United States General Appraisers for many years struggled with a kindred proposition until they have finally arrived at satisfactory rules whereby both importer and manufacturer can be heard under them in the matter of imports and the correctness of their invoices. There is no reason why the United States Tariff Commission can not adopt similar rules. It would but require that true trade secrets be held inviolate and confidential and would eliminate all marks of identity as to persons giving testimony in these cases. But all facts produced which are to be the basis of a new duty should be laid open to interested parties who are to be present at their taking, or at least before final acceptance by the Tariff Commission, be heard thereupon, and to offer evidence in contradiction thereof.

Respectfully submitted,

MARION DE VRIES.

Exhibit 12.

United States Tariff Commission, 8th and E Streets N. W., Washington.

Thomas O. Marvin, Chairman; William S. Culbertson, Vice-Chairman; David J. Lewis, Edward P. Costigan, William Burgess, Henry H. Glassie. John F. Bethune, Secretary.

Address reply to United States Tariff Commission.
File No. —.

October 2, 1923.

De Vries & Doherty,
Southern Building,
Washington, D. C.

DEAR SIRS:

The United States Tariff Commission has considered motions submitted by you at the public hearing on September 26, 1923, in the investigation under the provisions of Section 315 of the Tariff Act of 1922, in respect to Sodium Nitrite.

There is inclosed herewith for your information and guidance a certified extract from the minutes of the Tariff Commission showing the action of the Commission in ruling upon the motions referred to as submitted by Judge De Vries.

A copy of the Commission's action is being communicated to other parties interested in this investigation.

Very truly yours,

JOHN F. BETHUNE,
Secretary.

Inclosure.

Indorsed: U. S. Customs Court. Exhibit 12. No. 92852-G. Date: 1/24, 1930. S. C. H., Reporter.

Extract from the Minutes of a Meeting of the United States Tariff Commission October 2, 1923.

Present: Commissioners Marvin, Culbertson, Lewis, Costigan, Burgess, and Glassie.

Voted: That upon the requests made by counsel for the Norwegian Nitrogen Products Company on September 26, 1923, at the Public Hearing in the investigation (No. 7) under the provisions of Section 315 of Title III of the Tariff Act of 1922, in respect of Sodium Nitrite, the Commission rules as follows:

1. The Commission, in addition to holding a public hearing in which Judge De Vries participated as counsel for the parties of record represented by him, has submitted to the parties appearing at such hearing a written statement embodying the result of the Commission's field investigations. At the adjourned hearing, set for October 6, 1923, all parties interested, including those represented by Judge De Vries, will have an opportunity to meet the matter embodied in such statement. In so far as the first request of Judge De Vries is a request for leave to inspect the original and primary data collected by the Commission's investigators in the field and embodied in such statement, or is a request for additional information respecting the same beyond what the Commission has already submitted, the request is denied.

2. At the adjourned public hearing, set for October 6, 1923, opportunity will be afforded all parties interested to offer any evidence they may have with respect to the matter embodied in the Commission's statement of the field investigations conducted by its staff and such parties will have opportunity to be heard upon the same. In so far as the second request of Judge De Vries is a request to offer evidence and to be heard upon the question of the cost of power in the United States for the production of nitrites and to offer evidence and to be heard in respect of the matter embodied in the statement submitted by the Commission to the parties, the request is granted. In so far as it is a request to inspect the original cost and other data collected in the field by the Commission's investigators or the figures showing the details of individual costs of production obtained by the Commission under the sanction of Section 708 of Title VII of the Revenue Act of September 8, 1916, the request is denied.

3. At the adjourned hearing set for October 6, 1923, all parties interested will be afforded an opportunity to offer any relevant and material evidence in their possession with respect to the number of laborers employed and the wages

paid by the American Nitrogen Products Company. To this extent the third request of Judge De Vries is granted; but in so far as that request asks for inspection of the original data showing the production costs in respect of labor of the American Nitrogen Products Company submitted by or obtained from said Company under the sanction of Section 708 of Title VII of the Revenue Act of September 8, 1916, the request is denied.

4. At the adjourned hearing set for October 6, 1923, all parties interested will be afforded an opportunity to offer any relevant and material evidence in their possession with respect to capital invested in the American Nitrogen Products Company. To this extent the fourth request of Judge De Vries is granted; but in so far as that request asks for inspection of the original data relating to the production costs of the American Nitrogen Products Company submitted by or obtained from said Company under the sanction of Section 708 of Title VII of the Revenue Act of September 8, 1916, the request is denied.

5. The fifth request of Judge De Vries, in so far as it asks for an opportunity to cross-examine experts of the Commission with respect to the costs data and other matter obtained by them in the course of the investigation in the field, is denied. But at the adjourned hearing set for October 6, 1923, all parties interested will be afforded an opportunity to offer any relevant and material evidence in their possession, and to be heard, with respect to the matter embodied in the Commission's statement heretofore submitted to the parties interested appearing in such investigation. In so far as the fifth request of Judge De Vries is a request for an opportunity to meet, by evidence and argument, the matter embodied in such statement, the request is granted. In so far as it is a request to cross-examine the Commission's investigators concerned in obtaining the matter summarized in said statement with respect to the performance of their official duties and functions in such investigation, and in so far as it is a request for inspection of the cost data and other matter so obtained and embodied in said statement, said request is denied.

A true copy.

JOHN F. BETHUNE,
Secretary.

Exhibit 13.

De Vries, Doherty, Davis & Lamb, Counsellors-at-Law,
Southern Building, Washington, D. C.

Telephone: Main 2688.

Washington Office: Marion De Vries, Thomas J. Doherty, George Roscoe Davis, George F. Lamb, Jesse P. Crawford; George F. De Venny.

New York Office: 120 Broadway.

April 19, 1924.

Hon. Thomas O. Marvin,
Chairman U. S. Tariff Commission,
Washington, D. C.

DEAR MR. CHAIRMAN:

Enclosed herewith please find copy of a letter under date line of April 19, 1924, addressed to the President of the United States in the matter of the application of the American Nitrogen Products Company before the United States Tariff Commission for an increase of duty upon nitrite.

The enclosure is transmitted to you for yourself and the Commission as advisory of its transmittal to the President, and also in protest of any action upon the part of the Commission, in transmitting any report to the President upon the subject matter of nitrite, involved in said proceeding prior to final adjudication of the mandamus proceeding now pending in the Supreme Court of the District of Columbia.

Very respectfully yours,

MARION DE VRIES.

MDeV:HC.
(Encl.)

Indorsed: U. S. Customs Court. Exhibit 13. Prot. No. 92852-G. Date: 11/24, 1930. S. C. H., Reporter.

Received in my office May 6, '24.
H. C. K.

Indorsed: U. S. Customs Court. Exhibit 13. Prot. No. 92852-G. Date: 11/24, 1930. S. C. H., Reporter.

April 19, 1924.

To the President,
The White House,
Washington, D. C.:

DEAR MR. PRESIDENT:

Some time since I addressed you upon the subject of the application by the American Nitrogen Products Company of Seattle for an increase in the rate of duty upon nitrite. The reason prompting that letter was current reports of reliable character that you had been appealed to, to direct the United States Tariff Commission to send you the result of their investigations upon the subject-matter, while there was, as there still is, pending in the Supreme Court of the District of Columbia a proceeding to require the said Commission to grant opposing parties certain legal rights claimed to have been denied them by that Commission in said proceeding. Receipt of said letter and the data accompanying the same not having been acknowledged I deem it my duty to my clients, lest the same may have been mislaid, to again address you upon the subject.

It is my opinion that any action by the United States Tariff Commission in certifying to you the results of their investigations upon that subject-matter before the Supreme Court of the District of Columbia has exhausted its jurisdiction with reference thereto would be in contempt of court. I feel that you will agree with me that while a matter is pending in any court and before final judicial conclusion thereupon, any action by any party which will deny the court the power to enforce final judgment and thereby take out of the jurisdiction of the court the subject-matter of the proceeding so as to make a possible judgment a nullity and unenforcible would be in contempt of that court. The Supreme Court of the United States in Bessette *vs.* Conkey Company, 194 U. S., 324, 327, stated:

"The purpose of contempt proceedings is to hold the power of the court *and also to secure to suitors therein the rights by it awarded.*"

No one will question that the removal of a subject-matter the subject of a proceeding in a court beyond the jurisdic-

tion of the court so that "the rights by it awarded" to one of the suitors by final decree is clearly within this definition.

Not only would the action be in contempt of court but it would be unwarrantable and inexcusable deprivation of the rights of the successful parties in such a proceeding.

The said proceeding consists in an application for a writ of mandamus. An alternative writ has been directed to the United States Tariff Commission directing that they show cause why they should not grant the interested parties certain rights in said investigation. Return was made to that writ. Thereupon demurrer was filed to the return of the Commission. The demurrer has been argued, submitted and overruled. In the present status the case will either be set down for trial so as to present all the facts involved, as well as the law, or an appeal will be taken to the Court of Appeals of the District of Columbia from the decision upon the demurrer. As counsel for the interested parties I beg to advise you, that one of these proceedings will certainly be promptly taken. The case is still within the jurisdiction of the Supreme Court of the District of Columbia for any and all of said purposes.

The interested parties appearing are importers. They are domestic representatives of a foreign manufacturer of a friendly nation engaged in trade with the United States. I do not believe it will be the wish of the Executive of this country to deny these foreign manufacturers the statutory rights accorded them or the remedies afforded them by the courts of the United States by taking from the jurisdiction of those courts before the proceedings are completed the subject-matter of a particular litigation whereby they will be denied any effective judgment they may secure, or "the rights by it awarded."

Furthermore, while nominally the interested parties appearing in this proceeding is a corporation, incorporated under the laws of the State of New York, and an agent of said foreign manufacturing concern, its application to this court represents the interests of the great consuming public of the United States. It is in opposition to an effort before the United States Tariff Commission and thereafter the Executive to increase the rate of duty upon nitrite, from 3 to 4½ cents per pound. Nitrites are principally

used in the making of azo dyes. Azo dyes are used in dyeing the wearing apparel household furnishings and other articles of use in almost every household in the United States. This increase of duty will accordingly be a practically prohibitive rate of duty upon this article so used. The only concern complaining and actuating this proceeding, the record in the case will show, employs approximately sixteen men and has an invested capital of no more than $150,000. Moreover, that plant employs the arc-fixation process, a process for the production of nitrites which an eminent Commission of the War Department of the United States, after examining every plant in the world and the costs of production therein, *including that of the American Nitrogen Products Company at Seattle*, has reported the arc-fixation not a commercially feasible process for the production of nitrogen in the United States. See Report on the Fixation and Utilization of Nitrogen, prepared by the Nitrate Division, Ordnance Office, War Department 1922. There are other manufacturers of nitrite in the United States but they employ different processes and are not parties to this proceeding and are not complaining of the existing rate of three cents per pound upon nitrite.

Wherefore, it is respectfully submitted, that there is no warrant in law or fact for either the United States Tariff Commission in violation of the jurisdiction of the court to precipitately rush this case to the Chief Executive or for the Executive to make proclamation thereupon against the interests of all the consuming public of the United States and in violation of the legal rights of citizens of a friendly country proceeding in the courts of the United States.

When the United States Tariff Commission wa by Congress first created, one of the criticisms thereof was that it would be used by the party in power to put in force and effect highly protective and prohibitive rates of duty. While that criticism ordinarily would be unjustified, any action in the present case by either the United States Tariff Commission or the Executive to rush this case out of the Commission and to secure precipitate action by the Executive, while the rights of respective parties remain undetermined and within the jurisdiction of a court of the United States, would undoubtedly justify this stated criticism.

Wherefore, Mr. President, since the Tariff Commission is but the agency of the Executive in this proceeding this communication is to most respectfully but earnestly protest against any action upon the part of the Commission or the Chief Executive of the Nation, in taking or permitting any action to be taken, which will deprive the consumers of the country and a citizen of a foreign and friendly nation of due adjudication of their rights in a court of the United States.

Most respectfully yours,

MARION DE VRIES,
Attorney for Norwegian Nitrogen Products Company of New York.

MDeV:HC.

Exhibit 14.

The White House, Washington.

April 21, 1924.

My Dear Judge De Vries:

Your communication of April 15th, to the President, with relation to the application for an increase in the rate of duty upon nitrite, has been received and will be brought to his attention at the earliest possible moment.

Sincerely yours,

C. B. SLEMP,
Secretary to the President.

Hon. Marion De Vries, Southern Building, Washington, D. C.

Indorsed: U. S. Customs Court. Exhibit 14. No. 92852G. Date: 11/24, 1930. S. C. H., Reporter.

Exhibit 15.

Indorsed: U. S. Customs Court. Exhibit 15. No. 92852G. Date: 11/24, 1930. S. C. H., Reporter.

WASHINGTON, D. C., March 24, 1924.

To the President,
Washington, D. C.

DEAR MR. PRESIDENT:

Creditable information has come to this office that the State of Washington Delegation in Congress, and others, have made representation to you to direct the United States Tariff Commission to make report under the provisions of Section 315 of the Tariff Act of 1922 (The Flexible Tariff), upon the differences in the cost of production of nitrite in the United States as compared with that in foreign countries.

As the legal representative of the Norwegian Nitrogen Products Co., Inc., importers of nitrite and therefore "interested parties," we feel it our duty in opposition thereto, to adivse you of the following facts. Perhaps they may have been brought to your attention before. In any event duty to our clients requires that they should be registered in ample form.

Soon after the enactment of the Flexible Provisions of the Tariff Act of 1922, the American Nitrogen Products Company of Seattle, Washington, made application to the United States Tariff Commission for an increase of the rate of duty on nitrite provided in the Tariff Act of 1922, to wit, three cents, to four and one-half cents. In due course that application, at least that subject-matter, was noticed for public hearing by the said Commission.

Thereat the Norwegian Nitrogen Products Co., Inc., appeared in opposition to any increase of said rate of duty.

At said hearing the said Norwegian Nitrogen Products Co., Inc., was denied by the said Commission certain claimed legal rights allowed it by the provisions of said Act. To enforce said rights and to compel said Commission to grant the same the Norwegian Nitrogen Products Co., Inc., made application to the Supreme Court of the District of Columbia for a writ of mandamus to compel the same. An alternative writ was duly granted and served upon said Commission requiring them to show cause why said claimed rights should not be granted. Thereby the said Commission was brought within the jurisdiction of said court upon said sub-

ject-matter. Decision has not as yet been rendered by said Court therein.

By reason of the aforesaid circumstances, however, the said Commission and subject-matter are now within the jurisdiction of said court, and, in the opinion of the writer, any report by said Commission to the Executive upon said subject-matter, while said matter is pending in said court and the appellate process therefrom would be in violation of the orders of said court in that it would divest it and the courts appellate therefrom of jurisdiction of the subject-matter. In the opinion of the writer such would be the subject-matter of contempt of said court in that it would divest said court of and interfere with said court in the exercise of its jurisdiction of the subject-matter.

It is not assumed, for one moment, that the Executive, in view of the circumstances, would wish to become a party to the divestiture of the jurisdiction of said court of said subject-matter while said proceedings are pending either in the Supreme Court of the District of Columbia or in any of the appellate courts to which said proceeding may be appealed whichever way decision may be rendered.

Furthermore, as a representative of the Norwegian Nitrogen Products Co., Inc., in this proceeding, the undersigned herewith submits a copy of the brief of said company filed in said court before the said Commission. It is respectfully submitted that a careful perusal of said brief will convince the Chief Executive of the Nation that the petitioned increase in the duty laid upon nitrite imported into the United States is of exceedingly questionable merit. At least it is of such very questionable merit that the extraordinary action requested of the Chief Executive of the Nation should not be, under any circumstances, undertaken or had.

It is due said Commission to say the undersigned is assured by the Chairman thereof that it is not the purpose of said Commission to certify said case to the Executive while said court proceedings are pending though requested so to do by said American Nitrogen Products Company of Seattle, Washington.

Very respectfully submitted,

MARION DE VRIES,
Attorney for Norwegian Nitrogen Products Co., Inc.

DE VRIES, DOHERTY, DAVIS AND LAMB,
Of Counsel.

Exhibit 16.

United States Tariff Commission, Washington.

Sodium Nitrite.

Report of the United States Tariff Commission to the President of the United States.

Differences in Costs of Production of Sodium Nitrite in the United States and in Competing Foreign Country, as Ascertained Pursuant to the Provisions of Section 315 of Title III of the Tariff Act of 1922.

With Appendix.

Proclamation by the President.

Washington, Government Printing Office, 1924.

Indorsed: U. S. Customs Court. Exhibit 16. Prot. No. 92852-G. Date: 11/24, 1930. S. C. H., Reporter.

United States Tariff Commission.

Investigation of the Differences in Costs of Production of Sodium Nitrite.

To the President:

The United States Tariff Commission respectfully submits the following report upon an investigation of the differences in costs of production of sodium nitrite in the United States and in competing foreign countries for the purposes of section 315 of Title III of the Tariff Act of 1922.

Introductory.

Reference to Files.—This report is based upon the following documents, which are available for reference in the files of the Tariff Commission:

File of the original documents, including the application and Expert's Preliminary Report, dated November 17, 1922.

Expert's Confidential Report to the Commission, dated September 10, 1923.

Published Summary of Information in the Matter of Sodium Nitrite, dated September 10, 1923.

Stenographic Minutes of Hearings on September 10 and 26, and October 6, 1923.

Briefs of Applicant, the American Nitrogen Products Co., through Attorneys McCumber and Sullivan, on October 6, 1923, and on October 12, 1923.

Brief of the Norwegian Nitrogen Products Co., through Attorneys De Vries and Doherty.

Advisory Board's Final Summary Report to the Commission, dated October 29, 1923.

A Proclamation by the President of the United States of America Increasing Rate of Duty on Sodium Nitrite.

Whereas in and by section 315 (a) of Title III of the act of Congress approved September 21, 1922, entitled "An act to provide revenue, to regulate commerce with foreign countries, to encourage the industries of the United States, and for other purposes," it is, among other things, provided that whenever the President, upon investigation of the differences in costs of production of articles wholly or in part the growth or product of the United States and of like or similar articles wholly or in part the growth or product of competing foreign countries, shall find it thereby shown that the duties fixed in this act do not equalize the said differences in costs of production in the United States and the principal competing country he shall, by such investigation, ascertain said differences and determine and proclaim the changes in classifications or increases or decreases in rates of duty provided in said act shown by said ascertained differences in such costs of production necessary to equalize the same;

Whereas in and by section 315 (c) of said act it is further provided that in ascertaining the differences in costs of production, under the provisions of subdivisions (a) and (b) of said section, the President, in so far as he finds it practicable, shall take into consideration (1) the differences in conditions in production, including wages, costs of material, and other items in costs of production

of such or similar articles in the United States and in competing foreign countries; (2) the differences in the wholesale selling prices of domestic and foreign articles in the principal markets of the United States; (3) advantages granted to a foreign producer by a foreign government, or by a person, partnership, corporation, or association in a foreign country; and (4) any other advantages or disadvantages in competition;

Whereas, under and by virtue of said section of said act, the United States Tariff Commission has made an investigation to assist the President in ascertaining the differences in costs of production of and of all other facts and conditions enumerated in said section with respect to an article described in paragraph 83 of Title I of said Tariff Act of 1922, namely, sodium nitrite, being wholly or in part the growth or product of the United States, and of and with respect to a like or similar article wholly or in part the growth or product of competing foreign countries;

Whereas in the course of said investigation a hearing was held, of which reasonable public notice was given and at which parties interested were given a reasonable opportunity to be present, to produce evidence, and to be heard;

And whereas the President upon said investigation of said differences in costs of production of said article wholly or in part the growth or product of the United States and of the like or similar article wholly or in part the growth or product of competing foreign countries, has thereby found that the principal competing country is Norway and that the duty fixed in said title and act does not equalize the differences in costs of production in the United States and in said principal competing country, namely, Norway, and has ascertained and determined the increased rate of duty necessary to equalize the same.

Now, therefore, I, Calvin Coolidge, President of the United States of America, do hereby determine and proclaim that the increase in the rate of duty provided in said act shown by said ascertained differences in said costs of production necessary to equalize the same is as follows:

An increase in said duty on sodium nitrite from 3 cents per pound to 4½ cents per pound.

In witness whereof, I have hereunto set my hand and caused the seal of the United States to be affixed.

Done at the city of Washington this sixth day of May, in the year of our Lord one thousand nine hundred and twenty-four, and of the Independence of the United States of America the one hundred and forty-eighth.

CALVIN COOLIDGE.

By the President:

[SEAL.] CHARLES E. HUGHES,
Secretary of State.

Indorsed: United States Court of Customs and Patent Appeals. Filed Jul. 2, 1931. Arthur B. Shelton, Clerk.

UNITED STATES COURT OF CUSTOMS AND PATENT APPEALS

Friday, February 12, 1932.

At a session of said court continued and held at the city of Washington, pursuant to adjournment, on this 12th day of February, A. D., 1932.

Present: The Honorable William J. Graham, Presiding Judge, and the Honorables Oscar E. Bland, Charles S. Hatfield, Finis J. Garrett, and Irvine L. Lenroot, Associate Judges.

The court was opened for business in due form.

* * * * * * *

Customs Appeal No. 3454

NORWEGIAN NITROGEN PRODUCTS COMPANY, Appellant,

v.

THE UNITED STATES, Appellee

Said appeal came on to be heard before the court and after hearing the arguments of counsel the cause was taken under advisement by the court.

Appellant granted until February 17, and appellee until February 24 to file supplemental briefs.

* * * * * * *

(Signed) William J. Graham, Presiding Judge.

UNITED STATES COURT OF CUSTOMS AND PATENT APPEALS

No. 3454

NORWEGIAN NITROGEN PRODUCTS COMPANY, Appellant,

v.

THE UNITED STATES, Appellee

CERTIFICATE OF IMPORTANCE

To the Honorable the Judges of said Court:

In accordance with the provisions of the Act of Congress establishing the United States Court of Customs and Pat-

ent Appeals, I hereby certify that, in my opinion, the case above-stated is of such importance as to render expedient its review by the Supreme Court of the United States in the manner provided by said Act.

This — day of ——, 1932.

(Signed) William D. Mitchell, Attorney General.

United States Court of Customs and Patent Appeals. Filed March 25, 1932. Arthur B. Shelton, Clerk.

May 2, 1932

UNITED STATES COURT OF CUSTOMS AND PATENT APPEALS,
OCTOBER TERM, 1931

Customs Appeal No. 3454. Customs Calendar No. 56

NORWEGIAN NITROGEN PRODUCTS CO., Appellant,

v.

THE UNITED STATES, Appellee

BLAND, Judge:

This is an appeal by the importer from the judgment of the United States Customs Court (one member dissenting), holding sodium nitrite to be properly dutiable at 4½ cents per pound in accordance with a proclamation of the President of the United States, T. D. 40204, 45 Treas. Dec. 642, made pursuant to the terms of section 315 of the Tariff Act of 1922.

That portion of the protest of the importer, appellant, with which we are here concerned, is grounded upon the contention that the Tariff Commission, during its investigation of production costs which preceded the proclamation of the President, did not "at any time give reasonable public notice thereof and did not afford interested parties appearing therein reasonable opportunity either to be present, or to produce evidence, or to be heard, as required by law and the rules of said Commission"; that the proceedings before the commission were null and void, which resulted in there being made no investigation of the subject

matter by the commission, and that under such circumstances the proclamation of the President is invalid and the collector's levying of duty at a rate higher than 3 cents per pound as provided for in paragraph 83 of said tariff act is unwarranted in law.

Appellant in its brief points out that the material facts in this case are fully recited in Norwegian Nitrogen Products Co. v. Tariff Commission, 274 U. S. 106, and we think the facts on which the issues here depend are there sufficiently set out, and we quote the following from the opinion in that case:

The Tariff Act of September 21, 1922, c. 356, §315, 42 Stat. 858, 941, vested in the President the power to adjust tariff duties so as to equalize differences in costs of production here and abroad of articles wholly or in part the growth or product of this country, whenever an investigation by the Tariff Commission should reveal disparate costs. Such investigation is made a prerequisite to action by the President in proclaiming changes of rates. By Executive Order of October 7, 1922, it was provided that all petitions or applications for action or relief under the so-called flexible sections of the Tariff Act of 1922 should be filed with the Tariff Commission.

In October, 1922, the American Nitrogen Products Company, a corporation of the State of Washington, filed with the United States Tariff Commission a petition praying for a fifty per cent. increase in the duty imposed by the Tariff Act of 1922 upon imported sodium nitrate. The following March, the Tariff Commission, for the purpose of assisting the President in the exercise of the powers delegated to him by the Act of 1922, ordered an investigation of the differences in cost of production of sodium nitrite at home and abroad, and of other pertinent facts and conditions. It was further ordered that all parties interested should be given an opportunity to be present and produce evidence at a public hearing to be held at a date to be fixed later.

Plaintiff in error engaged in the importation of nitrogen products into the United States which it sells on commission. It represents in the United States, as exclusive agent, the Norwegian Hydro-Electric Nitrogen Corporation, the only manufacturer of sodium nitrite in Norway. Repre-

sentatives of the Commission, in the course of its investigation, proceeded to Norway and Germany and sought from the Norwegian Company and from German manufacturers data showing the cost of production of sodium nitrite in those countries. This was refused. The Commission's experts were permitted to examine the books and records of American manufacturers, obtaining information of the domestic cost of production and other relevant data. This information was given under promise that it would be treated as confidential and upon the assurance that the rules of the Commission and § 708 of the Revenue Act of September 8, 1916, c. 463, 39 Stat. 756, 798, so required. Section 708 prohibits the Commission from revealing "the trade secrets or processes" of which it might learn in the course of its investigations.

After making its investigation, the Commission ordered a public hearing to be held on September 10, 1926. Its rules provided that: "Parties who have entered appearances shall prior to the filing of briefs, have opportunity to examine the report of the commissioner or investigator in charge of the investigation and also the record except such portions as relate to trade secrets and processes."

At the hearing, plaintiff appeared by counsel and demanded a complete copy of the application of the American Nitrogen Products Company, and attempted to cross examine its president as to its cost of production. In making these and other similar demands in the course of the hearings, plaintiff relied on the provisions of § 315 (c) of the Act of 1922, reading in part: "The commission shall give reasonable public notice of its hearings and shall give reasonable opportunity to parties interested to be present, to produce evidence, and to be heard. The commission is authorized to adopt such reasonable procedure, rules, and regulations as it may deem necessary." The Commission, holding that its action was controlled by § 708 of the Revenue Act of 1916, prohibiting it from divulging trade secrets or processes of which it acquired information in the course of investigation, excluded the questions asked and disclosed only a copy of the application of the American company, from which a statement of its costs of production had been deleted. On September 15, 1923, the Commission made a preliminary report stating the results of its inquiry. The report contained a review of the data

in the possession of the Commission, including an estimate of the cost of production in Norway, based upon such public sources in Norway as were available to it, both the Norwegian company and the plaintiff having refused to give any information on the subject. But following its settled policy, it withheld all material which would reveal the individual production costs of American manufacturers. Its practice is to publish the average domestic cost, but this was withheld here because the average cost was deemed informative of individual costs in view of the small number of American manufacturers. Hearings were resumed on September 26, at which plaintiff was given an opportunity to offer evidence, to make oral argument and to file briefs. Requests by plaintiff to cross examine the Commission's field examiners and experts and to inspect data gathered by them were refused.

The President's proclamation, which was made subsequent to the investigation hereinafter referred to and subsequent to the report to him by the Tariff Commission, contained, among other things, the following:

Whereas, under and by virtue of said section of said act, the United States Tariff Commission has made an investigation to assist the President in ascertaining the differences in costs of production of and of all other facts and conditions enumerated in said section with respect to an article described in paragraph 83 of Title I of said Tariff Act of 1922, namely, sodium nitrite, being wholly or in part the growth or product of the United States, and of and with respect to a like or similar article wholly or in part the growth or product of competing foreign countries;

Whereas in the course of said investigation a hearing was held, of which reasonable public notice was given and at which parties interested were given a reasonable opportunity to be present, to produce evidence, and to be heard;

And whereas the President upon said investigation of said differences in costs of production of said article wholly or in part the growth or product of the United States and of the like or similar article wholly or in part the growth or product of competing foreign countries, has thereby found that the principal competing country is Norway and that the duty fixed in said title and act does not equalize the

differences in costs of production in the United States and in said principal competing country, namely, Norway, and has ascertained and determined the increased rate of duty necessary to equalize the same.

The appellant in Norwegian Nitrogen Products Co. v. Tariff Commission, supra, who is appellant in the case at bar, filed in the Supreme Court of the District of Columbia, a petition for mandamus directing the Tariff Commission to disclose the information which it had obtained concerning the cost of production, and to do other things which it had requested the Tariff Commission to do as is indicated by the above statement. The Supreme Court of the District of Columbia dismissed the petition, chiefly on the ground that under section 708 of the Revenue Act of September 8, 1916, it was made unlawful for any member of the United States Tariff Commission or employee of the same to make known trade secrets or processes of any person which the Commission had investigated.

The petitioner then appealed to the Court of Appeals of the District of Columbia and while the appeal was pending, the commission completed and submitted its report to the President. The Court of Appeals affirmed the judgment of the Supreme Court of the District of Columbia for the reason that the case had become moot by the action of the President in fixing the new rate of duty. Notwithstanding this determination, it reviewed the case at length and held substantially with the appellant's contentions in this case. The cause then went to the Supreme Court of the United States on writ of error where that court vacated the judgments of the two lower courts and remanded the cause with directions to dismiss the petition as moot.

The main consideration that brought the Customs Court to its conclusion that the proclamation was valid is that it concluded that the President had acted in all respects in accordance with the requirements of the statute and that since the President was not required to follow the findings of the commission, any irregularity in the investigation of the commission could not have the effect of invalidating his proclamation. Our decision in Clarke v. United States, 17 C. C. P. A. (Customs) 420, T. D. 43866, is relied upon as supporting authority.

While the protest raises the constitutionality of the flexible tariff provision under consideration, this issue is not pressed

here, it being conceded that Hampton, Jr. & Co. v. United States, 14 Ct. Cust. Appls. 350, T. D. 42030, and Hampton & Co. v. United States, 276 U. S. 394, settle that issue.

The contention of appellant, we think, is sufficiently indicated by what has been heretofore set out. The assignments of error raise all the questions above indicated and also challenge the correctness of the action of the court below in rejecting certain testimony and documentary exhibits offered by appellant and in granting the motion of the Government to strike out all testimony and documents which had been offered by appellant.

The Government contends that the action of the commission fully complied with the statute; that the proclamation was not subject to judicial review; that any alleged irregularities of the Tariff Commission in its investigations are not properly at issue, and that the questions presented in this appeal are not justiciable. The Government further argues that if the character of the investigation which the Tariff Commission made and the hearing which it held are to be inquired into by the court, in order to determine the validity of the proclamation, it must be found that the appellant obtained all the information and privileges to which it was entitled, and lastly argues that by reason of appellant's refusal to give the Tariff Commission information as to the cost of production and by reason of its failure to cooperate with the Tariff Commission in determining the differences in the cost of production, it had forfeited its right to claim that it did not have a proper hearing before the commission. In view of our conclusion in this case, we deem it unimportant to discuss the last contention of the Government.

We disagree with the contention of the Government that since the proclamation recites that the prerequisites of the statute had been complied with, the truthfulness of these statements cannot be inquired into in a proceeding wherein the validity of the proclamation and the validity of the tariff duty levied pursuant thereto is in question.

The decision of this case, as we see it, depends upon what force and effect is to be given the following language used by Congress in section 315 of the Tariff Act of 1922 when read in connection with the other language in the section:

Investigations to assist the President in ascertaining differences in costs of production under this section shall be

made by the United States Tariff Commission, and no proclamation shall be issued under this section until such investigation shall have been made. The commission shall give reasonable public notice of its hearings and shall give reasonable opportunity to parties interested to be present, to produce evidence, and to be heard.

The effect of importer's contentions, as we view them, is that a hearing or an investigation is required which is similar to and comparable with a hearing in a judicial tribunal where vital rights are at issue. The whole argument made by counsel for appellant would seem to rest upon the fact that his client had not been granted such a hearing as it was entitled to in order that its rights be protected under the due process clause of the Constitution. For a number of reasons we conclude that this position cannot be successfully defended. It is unnecessary to enumerate or to discuss all of them.

The legislative history of this particular provision is highly suggestive of the intent of the legislature. A provision inserted in the bill by the committee of the Senate that the commission be authorized to hold such hearings and to adopt such procedure, rules, and regulations as it deemed necessary for adequate investigation under this section, was amended in the Senate so as to read as follows:

The commission shall give reasonable public notice and shall give reasonable opportunity to parties interested to be present and to produce evidence and to be heard. Such hearings shall be public. Subject to the foregoing, the commission is authorized to adopt such reasonable procedure, rules, and regulations as it may deem necessary.

This provision was changed in conference to the form in which it now appears in the statute. The managers on the part of the House reported (62 Cong. Rec., pt. 12, p. 12660):

The action of the conferees eliminates the provision of the Senate amendment that the Tariff Commission hearings shall be public and that the President shall make the findings, hearings, and testimony in all proceedings public as soon as practicable after the issuance of a proclamation.

It will be noticed that the provision existing in the bill when it passed the Senate, requiring that the hearings

should be public and that the President should make the findings, etc., public, was removed through the recommendation of the conferees. This would seem to imply that it was the intent of Congress by the use of the language in question to permit the commission to have hearings both public and private if it desired; that while it was obligatory upon the commission to give reasonable notice and give interested persons a reasonable opportunty to be present, to produce evidence, and to be heard, its investigations were not in the nature of the trial of an issue entitling the litigants to a full knowledge of all facts submitted, as would be required in many of the hearings referred to in the cases relied upon by appellant.

A consideration of the section as a whole, the purpose it was intended to accomplish as part of a protective tariff bill, the legislative history of the same, and a comparison of it with somewhat similar provisions in the same act leads us to the irresistible conclusion that the chief concern of Congress in enacting the particular provision in question was to ensure that the President in the performance of the responsible task entrusted to him should have the assistance of a more or less independent agency in ascertaining the facts upon which his proclamation was to depend. At the same time, the language used shows that Congress did not intend that the commission in its investigation should refuse to hear interested parties. We cannot conclude, however, that the desire of Congress to afford the President the opportunity of having an unhampered and efficient agency to assist him was subordinated to its solicitude concerning the privileges to be granted interested parties. The correctness of this conclusion becomes more apparent when viewed in the light of the fact that the rights of interested parties are not necessarily affected in the least by such investigation, since whatever is done by the commission is in no sense binding on the President, but is only intended to assist him in a matter which he alone is authorized to determine.

Since our determination of the kind of investigation the statute requires must necessarily be influenced by a consideration of the purpose of such investigation and the ultimate control it may have over the duty to be levied, it is important to consider what is required of the President and what he is privileged to do. The statute authorizes the President to ascertain the differences in the costs. It is he,

after all, who ascertains. He does not have to rely upon the evidence produced before or the recommendations made by the commission. There is nothing in the section which prevents him from making such inquiries as he deems proper or from ignoring everything that is done by the commission. While the evidence produced before the commission, and their findings, except in rare cases, would no doubt be persuasive, they, in no sense, are made binding upon him.

Appellant urges that the quoted portion of the proclamation shows conclusively that the President made no investigation but relied on the investigation of the commission. It is our view that whether the President did or did not rely, wholly or in part, upon an investigation made by himself is immaterial. Our determination of the kind of investigation intended by Congress cannot depend on whether the President does or does not avail himself of the privileges he has under the statute.

The plain, unambiguous language of the statute, however, is "and no proclamation shall be issued under this section until such investigation shall have been made." The statute further provides that at the commission's hearings in such investigation it "shall give reasonable opportunity to parties interested to be present, to produce evidence and to be heard." It seems clear to us that Congress did not wish to entrust the duty of changing tariff rates to the President without assuring that he had at his command a suitable authorized agency to make such inquiry and report such facts as might be helpful to him. Therefore, we think that such an investigation as is indicated by the provision under consideration is a condition precedent to the issuance of a valid proclamation. If no such investigation is had, the proclamation is void, and any duty levied by reason of the same is unwarranted in law. Hampton & Co. v. United States, 276 U. S. 394; Union Bridge Co. v. United States, 204 U. S. 364; William A. Foster & Co., Inc., et al. v. United States, Suit No. 3458, 20 C. C. P. A. (Customs) —, T. D. —; United States v. Fox River Butter Co., cross-appeals, Suits Nos. 3438 and 3442, 20 C. C. P. A. (Customs) —, T. D. —, the last two cases decided concurrently herewith. In a suit of this character arising upon protest, the collector's unwarranted action may be successfully challenged. Hampton, Jr. & Co. v. United States, supra; Hampton Co. v. United States, supra.

The controlling question before us is: Was there an investigation of the character prescribed by Congress? It is not denied that appellant was given the privilege of being present at the hearing; that it had the opportunity to produce all the evidence it sought to produce, and more than it was willing to produce, and no complaint is made that it was not given reasonable opportunity to be heard at length in argument. It was privileged to cross examine the chief adverse witness. The witness refused to answer some of the questions, the effect of which refusal is not before us for consideration. Appellant complains that it was denied the right to have full knowledge of all the facts obtained confidentially or otherwise by the commission, which it had the right to meet by rebutting proof and by argument. To hold that appellant was entitled to such privileges as a right granted under the provisions of the statute under consideration would be to hold that appellant's rights at the hearing are comparable to its rights in a law suit or in hearings of entirely different character, elsewhere herein referred to.

The hearing before the Tariff Commission was not a judicial inquiry. Prentis v. Atlantic Coast Line, 211 U. S. 210, 226. If the inquiry at bar when made would result in a finding which would be binding upon the President and result in a new rate of tariff duty being substituted for the old one, there would be considerable more plausibility in appellant's contention. However, we do not mean to say, even under these supposed circumstances, that the interested party has a right in a given tariff rate. No one has any legal right to the continuance of a customs duty. Indeed, he may be deprived of the right of importation entirely.

Appellant has relied upon Interstate Commerce Commission v. Louisville & Nashville R. R. Co., 227 U. S. 88, St. Louis Railway Co. v. Interstate Commerce Commission, 264 U. S. 64, and other quite similar cases as supporting its contention. These cases are not in point for the reasons we have just discussed, if for no other. The hearings before the Interstate Commerce Commission, considered in those cases, resulted in the fixing of rates which the railroads were directed to accept for their services. They involved the maintenance of definite rights which, under due process, the railroads could defend. The hearings of the Commerce Commission were not for the purpose of aiding someone

else in determining a rate which might or might not be finally fixed. The rates were based upon the facts disclosed at the hearings. This is not necessarily so in the case at bar.

We think considerable light is thrown on the question of what kind of investigation was within the contemplation of Congress by a consideration of what it was trying to do by the enactment of the flexible tariff provision. Ordinarily Congress definitely fixes tariff rates in tariff acts. When it enacted the act which included the section under consideration, it recognized that its own investigations as to the differences in production costs were necessarily very limited in their scope and that the rates it prescribed might not accurately measure the differences in such costs. Furthermore, the probability of changes in such costs was to be expected. The President was permitted only to raise or lower the duty 50 per centum and to make nothing dutiable that was free, and nothing free that was dutiable. Surely Congress did not contemplate that the investigation by the President or the Tariff Commission should be carried on under the rules of technical judicial inquiry, when its own inquiries, in trying to equalize production costs, are characterized by so little formality. An inquiry such as appellant contends for, we think would so delay and hinder the operation of the flexible provision as to almost make it useless. In the case at bar the inquiry began nearly ten years ago. If such an inquiry were required and this court in each instance were called upon to judicially review the details of such inquiry, it would be difficult for the flexible provision to accomplish its intended purpose. Our review of such hearings upon protest would be the same substantially as if Congress had provided a direct appeal to this court.

It is significant, we think, that Congress in section 316 of the same act, relating to unfair competition, provided for an investigation and for an appeal to this court on issues of law. Under that section we are authorized to review and do review questions of law arising from such investigations. Ex parte Bakelite Corp., 279 U. S. 438. If Congress had contemplated what appellant contends for here, we think it more than probable that it, in section 315, supra, would have provided for a similar review by this court.

Appellant at the trial below offered in evidence certain

documents which constitute 16 exhibits in the case. The Government objected to their admission. The documents were filed but decision as to their admissibility was reserved. At the close of the hearing the Government moved to strike out all of said documents. The court did not rule upon the Government's motion but reserved the decision on the motion, and in its decision, which is now before us, the court said:

> The testimony offered by the plaintiff is not only immaterial but incompetent to any issue involved. The objection thereto made by the Government is sustained, the motion to strike it out is granted, and an exception given to the plaintiff.

Appellant has assigned error on this action of the court below. Exhibits 1 to 16, inclusive, are as follows:

Exhibit 1. Executive Order of the President, dated Oct. 7, 1922, directed to the commission.

Exhibit 2. Rules adopted by the commission Oct. 26, 1922.

Exhibit 3. Order for investigation by commission.

Exhibit 4. Notice of public hearing.

Exhibits 5, 6 and 7. Testimony taken before commission.

Exhibit 8. Deleted copy of letter to commission by appellant's counsel.

Exhibit 9. Commission's letter to appellant's counsel enclosing summary of information compiled by commission in connection with the investigation.

Exhibit 10. Letter to appellant's counsel giving certain rules and information by the commission.

Exhibit 11. Letter from appellant's counsel to commission asking for information contained in Exhibit 10.

Exhibit 12. Commission's letter to appellant's counsel giving extract from minutes of a meeting of the commission.

Exhibit 13. Letter from appellant's counsel to commission enclosing copy of appellant's counsel's letter to the President.

Exhibit 14. Letter from White House to appellant's counsel acknowledging receipt of letter referred to in Exhibit 13.

Exhibit 15. Letter of appellant's counsel to the President.

Exhibit 16. Report of commission to the President.

If the statement in the proclamation that there had been notice and a hearing of the character prescribed by the statute is conclusive, then, of course, the court's ruling on the Government's motion was correct, regardless of the contents of the offered documents. On the other hand, if the President's proclamation is not conclusive of the things stated, then documents of the character of some of those offered might be very material, depending upon their content. For instance, a notice of a public hearing might constitute substantial evidence that there was no valid notice served. A report of the commission to the President might show affirmatively that there was no investigation of the character required by the statute. As we interpret the statute, it would have been proper for the court to have admitted any such document which had evidentiary value toward proving that the prerequisite provisions of the statute had not been complied with. United States v. S. Leon & Co., cross appeals, Suits Nos. 3487 and 3493, — C. C. P. A. (Customs) —, T. D. —, decided concurrently herewith.

We have looked over these exhibits with care and conclude that nothing is therein contained which tends to prove that there was a lack of such notice or investigation by the commission as the statute contemplates. On the contrary, most of the exhibits possess evidentiary value tending to prove that there was such notice and investigation. The appellant was not prejudiced by the court's refusal to receive them.

These exhibits were stricken out by the court below and are not to be regarded here as proof that the statutory prerequisites under consideration were complied with. No affirmative proof is necessary since, in the absence of proof to the contrary, it will be presumed that such prerequisites were complied with.

Many authorities have been cited on both sides as having bearing on the nature of the hearing and investigation before the Tariff Commission. All the many authorities cited on both sides of the case have been considered by us, but we have found it unnecessary to discuss most of them. In Londoner v. Denver, 210 U. S. 373, 386, in a case involving the nature of a hearing by the city council which the statute granted to those interested in street improvement taxes, the court said:

If it is enough that, under such circumstances, an opportunity is given to submit in writing all objections to and complaints of the tax to the board, then there was a hearing afforded in the case at bar. But we think that something more than that, even in proceedings for taxation, is required by due process of law. Many requirements essential in strictly judicial proceedings may be dispensed with in proceedings of this nature. But even here a hearing in its very essence demands that he who is entitled to it shall have the right to support his allegations by argument however brief, and, if need be, by proof, however informal.

While this case relates to direct taxation upon property and is not analagous to the exact issue presented here, we think that most of the quoted language used by the court might be well employed in the decision of the case at bar.

We conclude that the statutory prerequisites for the issuance of the proclamation were complied with; that the collector's levying 4½ cents per pound on the involved merchandise was warranted in law, and that the court below properly overruled the protest, and its judgment is affirmed.

Affirmed.

UNITED STATES COURT OF CUSTOMS AND PATENT APPEALS

Monday, May 2, 1932.

At a session of said court continued and held at the city of Washington, pursuant to adjournment, on this 2nd day of May, A. D. 1932.

Present: The Honorable William J. Graham, Presiding Judge, and the Honorables Oscar E. Bland, Charles S. Hatfield, Finis J. Garrett, and Irvine L. Lenroot, Associate Judges.

The court was opened for business in due form.

* * * * * * *

Customs Appeal No. 3454

NORWEGIAN NITROGEN PRODUCTS COMPANY, Appellant,

v.

THE UNITED STATES, Appellee

Said appeal having heretofore been brought on to be heard before the court and due consideration thereon having been had, it is—

Ordered that the judgment of the United States Customs Court be, and the same is hereby, affirmed.

* * * * * * *

UNITED STATES COURT OF CUSTOMS AND PATENT APPEALS

Customs Appeal No. 3454

NORWEGIAN NITROGEN PRODUCTS COMPANY, Appellant,

v.

THE UNITED STATES, Appellee

CERTIFICATE RE MANDATE OF COURT OF CUSTOMS AND PATENT APPEALS

The final mandate in the above-entitled appeal, consisting of a certified copy of the order of the court of the 2nd day of May, 1932, was issued to the United States Customs Court on the 8th day of June, 1932.

Arthur B. Shelton, Clerk.

UNITED STATES COURT OF CUSTOMS AND PATENT APPEALS

Customs Appeal No. 3454

NORWEGIAN NITROGEN PRODUCTS COMPANY, Appellant,

v.

THE UNITED STATES, Appellee

CERTIFICATE OF CLERK

I, Arthur B. Shelton, Clerk of the United States Court of Customs and Patent Appeals, do hereby certify that the attached pages, numbered 1 to 217, inclusive, contain a true and complete transcript of the record and certain proceedings had in said court in the above-entitled appeal, as the same remain of record and on file in this office.

Witness my hand and the seal of this court this eighteenth day of July, A. D. 1932.

Arthur B. Shelton, Clerk. (Seal of the United States Court of Customs and Patent Appeals.)

SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed October 17, 1932

The petition herein for a writ of certiorari to the U. S. Court of Customs and Patent Appeals is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

FILE COPY

FILED
AUG 1 19
CHARLES ELMORE

Supreme Court of the United States

OCTOBER TERM, 1932.

No. 272

NORWEGIAN NITROGEN PRODUCTS COMPANY, *Appellant*,

v.

THE UNITED STATES, *Appellee*.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CUSTOMS AND PATENT APPEALS,

AND

BRIEF IN SUPPORT OF SAID PETITION.

MARION DE VRIES,
JESSE P. CRAWFORD,
H. KENNEDY MCCOOK,
Counsel for Petitioner.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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Supreme Court of the United States

OCTOBER TERM, 1932.

No. ....

NORWEGIAN NITROGEN PRODUCTS COMPANY, INC., *Petitioner,*

v.

THE UNITED STATES, *Respondent.*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CUSTOMS AND PATENT APPEALS.

To the Honorable, The Chief Justices and Associate Justices of the Supreme Court of the United States:

The petition of the Norwegian Nitrogen Products Company, Inc. respectfully shows:

That the Attorney General of the United States has certified that the case is one to warrant review by the Supreme Court of the United States (U. S. C. Tit. 28, Sec. 308).

That the decision of the United States Court of Customs and Patent Appeals here sought to be reviewed is contrary to and in conflict with the decision of the Court of Appeals of the District of Columbia theretofore rendered in the case of The United States ex rel Norwegian Nitrogen Products

Company, Inc., v. The United States Tariff Commission, et al., 6 Fed. (2d) 491, *both decisions being a construction of the same paragraph of the same statute in cases duly presented and decided between the same parties. The said decision of the Court of Appeals of the District of Columbia on appeal to this Honorable Court was declared a decision "upon the merits" and was not disturbed by this Honorable Court. United States of America ex rel Norwegian Nitrogen Products Company, Inc., Plaintiff in Error, v. United States Tariff Commission, Thomas O. Marvin, et al.*, 274 U. S. 106.

There is, therefore, hereby presented for determination the correctness of conflicting decisions between two courts of equal authority corresponding in jurisdiction to United States Circuit Courts of Appeal, and to both of which courts the same issues will again be presented in cases now pending, and no doubt often hereafter in both said jurisdictions, until final decision of these conflicting decisions by this Court.

QUESTIONS INVOLVED.

The case involves the following fundamental questions arising almost daily in the proceedings before the United States Tariff Commission under the flexible tariff provisions whereat great bodies politic and important commercial interests of the United States are constantly contending that they are by the Commission being denied their statutory rights which afford interested parties the right "to be present, to produce evidence, and to be heard" in the "hearings" of the said Commission of which "reasonable public notice" is required by the statute (42 Stat. 942, U. S. C. Tit. 19, Sec. 156). These questions so arising and hereby presented are as follows:

(a) The construction of and rights afforded interested parties appearing under the flexible tariff provisions, Section 315 (c) of the Tariff Act of 1922 (42 Stat. 942; U. S. C. Tit. 19, Sec. 156), which are essentially the same as the

provisions of the flexible tariff re-enacted as Section 336 of the Tariff Act of 1930 (46 Stat. 701; U. S. C. Tit. 19, Sec. 1336, 1931 Supplement), the former reading:

> "Investigations to assist the President in ascertaining differences in costs of production under this section shall be made by the United States Tariff Commission, and *no proclamation shall be issued* under this section until *such* investigation shall have been made. The commission shall give *reasonable public notice of its hearings* and shall give reasonable opportunity to parties interested *to be present, to produce evidence,* and *to be heard.* The Commission is authorized to adopt such reasonable procedure, rules, and regulations as it may deem necessary."

(b) The validity of the findings and proclamation thereof by the President made thereunder increasing rates of duty upon merchandise imported by Petitioner, upon the grounds, among others, that Petitioner has been denied its legal rights provided by said Act the granting of which are by the statute made conditions precedent to any such findings and proclamation thereof by the President and of an increased rate of duty;

(c) Whether by protest duly lodged under and by virtue of the provisions of Section 514 of the Tariff Act of 1922, which reads "All decisions of the collector, *including the legality of all orders and findings entering into the same,* as to the rate and amount of duties chargeable, and as to all exactions of whatever character * * *", a justiciable question was presented to the United States Customs Court or the United States Court of Customs and Patent Appeals, or this Honorable Court, by a case wherein was drawn into question the validity of the findings and proclamation thereof of the President made thereunder, entering into and constituting a factor of a rate of duty laid; for failure of the United States Tariff Commission to pursue the statutory prerequisites to render a valid report thereon to and proclamation by the President;

(d) Whether the record made in the proceedings before the United States Tariff Commission, under and by virtue of the provisions of said flexible tariff, was competent evidence to show that findings and a proclamation of the President thereof, made in pursuance of said proceedings, had not been preceded by a compliance by the Commission with the statutory conditions precedent thereto, regardless of any recitals in such proclamation;

(e) Whether a refusal of the United States Tariff Commission to grant interested parties appearing before it, in pursuance of due notice, in a proceeding under said flexible tariff, *a reasonable opportunity to produce evidence*, contrary to or in violation of the duly established rules of the Commission or the President, is such error as can be reviewed in such a proceeding as this and rendered any presidential proclamation based upon said proceedings void for failure to comply with the prescribed statutory conditions precedent;

(f) Whether, under the provisions of said flexible tariff, plant capacity, capital investment, costs of labor, costs of materials, costs of power, costs of overhead and costs of conversion, were "trade secrets";

(g) Whether the United States Tariff Commission, as a commission proceeding under the provisions of said flexible tariff commanding the memberships and agents thereof not to make public "trade secrets", was thereby or otherwise by law authorized to deny interested parties appearing the right "to be heard" upon any other data than trade secrets upon the particular subject matter before the Commission, and upon which it was proceeding to report to the President;

(h) Whether the United States Tariff Commission by regulation or otherwise could, under promise that cost information collected by it not trade secrets would be kept confidential, deny the right of interested parties duly appearing in the particular proceeding to inspect or be heard thereupon as by the said Act provided;

(i) Whether under the provision of the flexible tariff, Section 315, Tariff Act of 1922 (42 Stat. 941; U. S. C. Tit. 19, Sec. 154), findings and a presidential proclamation made before the United States Tariff Commission had made an investigation and report upon the particular subject matter *in accordance with the law and the rules prescribed by the President*, were for failure to comply with the statutory and regulative conditions precedent, valid findings and proclamation.

While the issues herein presented are with reference to the flexible tariff of 1922, they are by reason of the almost exact similarity of language with successor provisions of the current flexible tariff (1930) equally pertinent thereto, and, as shown by the petitions now before this Court for review of decisions with reference to the flexible tariff of 1930, concern and will affect a highly important part of the final construction of both Acts not in the other said cases here presented.

DECISIONS BELOW.

On February 12, 1932, the United States Court of Customs and Patent Appeals affirmed the judgment of the United States Customs Court overruling the contentions and protest of Petitioner. This opinion has not as yet been reported in the reports of that Court but will be found in Treasury Decisions, Vol. 61, issue of May 26, 1932, No. 21, page 91, T. D. 45674 (R. 200-213).

SUMMARY OF MATTERS INVOLVED.

The flexible tariff originated and was enacted as Sec. 315, Tariff Act of Sept. 21, 1922. (42 Stat. 941-3 U. S. C. 19. Secs. 154-9). Copy hereto annexed in pertinent parts marked Exhibit "A." October 24, 1922, The American Nitrogen Products Company of Seattle, Washington, filed a petition with the United States Tariff Commission to increase the rate of duty upon sodium nitrite

from 3 cents, as provided in said Act, to 4½ cents per pound. (R. 160). July 20, 1923, due notice was published that on the 10th day of September, 1923, at the office of the Commission in Washington, "*a hearing*" in said matter would be held "at which all parties interested will be given an opportunity *to be present, produce evidence and to be heard with regard to the differences in costs of production and all other facts and conditions enumerated in Sec. 315* of the Tariff Act of 1922," (R. 69, 72) affecting sodium nitrite. At said time and place the Norwegian Nitrogen Products Company, of New York, sole American selling agents of the Norsk Hydro-Electric Co., of Norway, importers of sodium nitrite, entered appearance as an interested party in opposition to said petition (R. 72) and demanded a complete copy of the petition filed by the American Nitrogen Products Company upon which the "hearing" had been noticed and was proceeding. This was denied, the Chairman of the Commission stating, "The Commission will protect the confidential nature of *all* information submitted to it (R. 85). Previously a *deleted* copy thereof had been furnished Appellant with all alleged "confidential" matter (costs) stricken (R. 160, 161, 162, 163). At this "hearing" Mr. Graff, President of the petitioner-company, declined to give plant capacity (R. 131) or cost of production (R. 131), stating they were "confidential information" given the Commission. At the continued "hearing" on September 26th, formal demand was made by Appellant as follows (R. 79):

> "* * * I want to make formal requests, as an interested party appearing in this case, that we have reasonable opportunity to inspect and to be heard upon all evidence which has been offered in this case, not deemed by the Commission trade secrets, or not, in fact, trade secrets or processes. That is request No. 1.
>
> "We want to make the further request that the Commission afford us the same rights to inspect, and to offer evidence in disputation thereof, if we see fit, and

to be fully heard upon, all the evidence in the possession of the Commission, as to the cost of power in the United States in the production of nitrite.

"Third, the same request as to the number of laborers employed, and the wages paid as shown in the American Nitrogen Products testimony submitted before this Commission.

"Fourth, the same request as to all capital invested in the American Nitrogen Products Company plant in the State of Washington.

"Fifth, referring to the summary of information in the matter of sodium nitrite, the subject of a public hearing September 10, 1923, that we have opportunity to cross-examine the experts of this Commission who gathered this testimony, as to the testimony which they have submitted to the Commission, and that we have the right to offer such testimony as we see fit in opposition thereto, and that we have the right and reasonable opportunity to be heard thereupon."

Said summary was mailed appellant September 15, 1923. (R. 163-175.)

October 6, 1923, these requests in so far as they related to inspection of evidence of costs before the Commission and the examination of the agents thereof, were formerly denied by the Commission (R. 146, 147, 148, 149) upon the ground that all such information was "confidential" or "trade secrets." Thereupon, and while the Commission was deliberating upon its report, Appellant obtained from the Supreme Court of the District of Columbia a temporary writ of mandamus, commanding the Commission to comply with Appellant's requests. The Commission answered that all information before it in these investigations as to plant investment, costs of labor, costs of power and costs of material was confidential and "trade secrets" which it was inhibited by law from disclosing. Appellant demurred to this answer. The Supreme Court of the District of Columbia overruled the demurrer. Appellant stood upon the pleadings and duly appealed to the Court of Appeals of the

District of Columbia. The Court of Appeals of the District of Columbia rendered a decision upon the merits *fully sustaining upon the merits every contention of Appellant;* but, taking judicial notice that, pending appeal, the Commission had made its report upon the matter to the President recommending, and he had made and proclaimed his findings and the petitioned increased rate of duty, held the case moot and upon that ground alone rendered judgment against Appellant (6 Fed. Rep. (2d) 491). This Honorable Court on appeal vacated the judgment of the Court of Appeals of the District of Columbia upon the point alone that the case was moot, but expressly declined to pass upon or review the case upon its merits although the Attorney General of the United States joined with counsel for Appellant in urging upon the Court the public importance of an early decision upon the merits of the case—

> *United States of America ex rel. Norwegian Nitrogen Products Co., Inc., Plaintiff in Error, vs. United States Tariff Commission, Thomas O. Culbertson, et al.,* 274 U. S. 106.

Meanwhile, under authority of Sec. 514 of the Tariff Act of 1922 (42 Stats. 969; U. S. C. Tit. 19, Sec. 398), *supra,* Appellant protested the assessment by the Collector of the increased duty upon all its importations of sodium nitrite, setting forth distinctly and specifically the particulars wherein the Commission had denied Appellant its statutory rights, had failed to follow the law, had denied Appellant a fair or legal hearing, wherefore the said proclamation of the President was void and the consequent assessment of the resultant increased rate of duty upon sodium nitrite was illegal. (R. 8, 9, 10, 11, 12.)

On due hearing of said protest before the United States Customs Court the decision of the Collector overruling said protest was affirmed (R. 37) (T. D. 44824). One Judge dissented (R. 52) on the grounds that the flexible tariff act was unconstitutional.

The Court predicated its decision upon the grounds that the courts did not have the power to review such a presidential finding of facts and proclamation thereof upon *any* grounds.

On appeal to the United States Court of Customs and Patent Appeals, the *judgment* of the United States Customs Court was affirmed, but the *decision* reversed. The appellate court held against all contentions of the Government save that the "hearing" contemplated by the statute (Sec. 315) had been given the interested parties appearing *by affording the mere right to introduce testimony* and without the right being afforded to inspect any of the evidence offered by the other side or collected by and before the Commission or to examine any of the Commission's agents (R. 200-213).

To review that judgment and decision this petition is presented.

JURISDICTION.

The statutory provision which sustains the jurisdiction of this Court herein is Section 195 of the Judicial Code (28 U. S. Code Annotated, 308) as amended in 1925 also U. S. C. Tit. 19, 1931 Supplement, 1647.

REASONS RELIED UPON FOR GRANTING OF WRIT.

1. The Attorney General of the United States filed in the United States Court of Customs and Patent Appeals a Certificate to the effect that this case was one warranting review by the Supreme Court of the United States (R. 199-200).

2. There is a conflict of decisions upon the issues of law herein rendered by the Court of Appeals of the District of Columbia and the United States Court of Customs and Patent Appeals, both of which courts as to the particular subject matter are next in authority to this Honorable Court, and in both of which there are pending cases involving the precise legal questions here in issue. This conflict of decisions will continue upon this very important

issue until final decision thereof is rendered by this Honorable Court.

3. The question involved is one of general importance. It is one which arises at almost every session of the United States Tariff Commission proceeding under the flexible tariff provisions of the existing law and in which great bodies politic and extensive importing and domestic interests have been striving for a final and determinative decision to wit, as to the meaning and their rights accorded by scope the words in the flexible tariff, Section 315 (a) of the Tariff Act of 1922 (42 Stats. 941; U. S. Tit. 19, Sec. 154), and Section 336 (a), Tariff Act of 1930 (46 Stats. 701; U. S. C. Tit. 19, Sec. 1336, 1931, Supplement), the language being essentially the same in each Act, as follows: "The Commission shall give reasonable public notice of its hearings and shall give reasonable opportunity to parties interested to be present, to produce evidence, *and* to be heard."

4. That the decision and judgment of the United States Court of Customs and Patent Appeals herein (R. 200-213) is erroneous in that it overrules the decision of the Court of Appeals of the District of Columbia rendered upon the merits of the case, which was not *obiter dictum*, and which this Honorable Court on appeal refused to disturb declaring it to be "upon the merits" of the case.

5. That the judgment of the United States Court of Customs and Patent Appeals is erroneous and should be reviewed by this Honorable Court because it overruled and did not sustain the protest of Petitioner against the action of the Collector of the Port of New York in assessing merchandise properly dutiable under Paragraph 83 of the Tariff Act of 1922 as originally enacted, at the higher rate imposed by the finding and presidential proclamation herein.

6. That the judgment of the United States Court of Customs and Patent Appeals is erroneous and should be reviewed for holding and deciding that the United States

Tariff Commission had legally pursued the law and the duly promulgated regulations relative to their procedure under the provisions of the said flexible tarff and had therefore made an illegal and invalid report of said matter to the President and the consequent findings and proclamation of the President in pursuance thereof illegal and void.

7. That the United States Court of Customs and Patent Appeals erred in not holding, as so held by the Court of Appeals of the District of Columbia construing the identical provision of the flexible tariff, "that the Appellant was deprived of the right *to be heard* as contemplated by the statute" but on the contrary holding that this Appellant was afforded all the statutory rights provided by the provisions of the said flexible tariff.

8. That the United States Court of Customs and Patent Appeals erred in not holding that the said findings and presidential proclamation thereof were illegal and void because at the time of the making thereof the United States Tariff Commission had not submitted to the President a legal and valid, and in consequence no report, upon the said subject matter ACCORDING TO LAW, as provided by the presidential order submitting such matters to the Tariff Commission, and by law and its own regulations required.

9. That the United States Court of Customs and Patent Appeals erred in not holding, though it referred to the same for the facts upon which it predicated its decision, that in all such cases the record made before the United States Tariff Commission is competent evidence to show whether or not the legal conditions precedent had been properly pursued as legal conditions to any presidential findings and proclamations.

Wherefore, your petitioner prays that a writ of certiorari issue under the seal of this Court, directed to the United States Court of Customs and Patent Appeals, commanding said Court to certify and send to this Court a full and complete transcript of the record and proceedings of said Court of Customs and Patent Appeals had in the case num-

bered and entitled on its docket, "Customs Appeal No. 3454, Norwegian Nitrogen Products Company, Appellant, v. The United States, Appellee", to the end that this cause may be reviewed and determined by this Court as provided for by statutes of the United States, and that the said judgment of the said United States Court of Customs and Patent Appeals be reversed by this Court and for such other and further relief as to this Honorable Court may seem just and proper.

And the petitioner will ever pray.

MARION DE VRIES,
JESSE P. CRAWFORD,
H. KENNEDY MCCOOK,
Counsel for Petitioner,
Southern Building,
Washington, D. C.

Dated July 25, 1932.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1932.

No. ———.

NORWEGIAN NITROGEN PRODUCTS COMPANY, INC., *Petitioner,*
v.
THE UNITED STATES, *Respondent.*

BRIEF FOR PETITIONER IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

OPINIONS OF THE COURTS BELOW AND THE STATUTES INVOLVED.

For the opinion of the United States Customs Court, dated April 21, 1931, see T. D. 44824 (R. 37-61).

For the opinion of the United States Court of Customs and Patent Appeals, dated May 2, 1932, see T. D. 45674 (R. 200-213).

For section 315 (a) and (c) flexible tariff provision of the Tariff Act of 1922, see Exhibit "A" hereto annexed.

For the proclamation of the President dated May 6, 1924, see (R. 196-198).

For protest of importer overruled by the United States Customs Court and by the United States Court of Customs and Patent Appeals, see (R. 8-12).

II.

PETITIONER'S LEGAL POSITION STATED.

The President was commanded by section 315 (a) of the Tariff Act of 1922 to make certain investigations as to differences in costs of production of certain foreign and domestic articles. Section (c) of the Act in part provided as follows:

> "Investigations to assist the President in ascertaining differences in costs of production under this section shall be made by the United States Tariff Commission *and no proclamation shall be issued under this section* until *such investigation* shall have been made. The Commission shall give reasonable public notice of its hearings and shall give reasonable opportunity to parties interested to be present, to produce evidence *and* to be heard. The Commission is authorized to adopt such reasonable procedure, rules and regulations as it may deem necessary."

Subdivision (e) provided that "the President is authorized to make all needful rules and regulations for carrying out the provisions of this section." Thereunder the President made the following order or regulation (Record 63-64):

> **"EXECUTIVE ORDER.**
>
> "It is ordered, that all requests, applications, or petitions for action or relief under the provisions of Sections 315, 316, and 317, of Title III of the Tariff Act approved September 21, 1922, shall be filed with or referred to the United States Tariff Commission for consideration *and for such investigation as shall be in accordance with the law* and the public interest, *under rules and regulations to be prescribed by such Commission.*"

The Tariff Commission, duly promulgated its rules wherein, after providing for the taking of testimony and

the acquisition of certain data under oath, and other matters constituting its record, adopted the following as part of its said regulations:

"The Commissioner or Investigator in Charge of Investigations.

"The Commissioner or investigator in charge of any investigation shall review all the evidence, oral and written, and all other information gathered in such investigation by the Commission, and shall summarize the same and prepare for the Commission in writing a report.

"Parties who have entered appearance shall, *prior to the filing of briefs,* have opportunity to examine *the report of the commissioner or investigator* in charge of the investigation *and also the record* except such portions as relate to trade secrets and processes.

Briefs.

"Briefs may be filed at the conclusion of the testimony in each investigation. The commissioner or investigator in charge of the investigation shall fix a time within which briefs shall be filed and notice thereof shall be given by registered mail to *all parties of record.*

* * * * * * * * *

Final Hearings and Findings.

"Final hearings shall be before the Commission. Parties who have previously entered appearances may file briefs and upon permission being granted by the Commission present oral arguments. *The findings of the Commission and of the members thereof shall be in writing and shall be transmitted, together with the record, certified by the Secretary under the seal of the Commission, to the President for his action under the law."*

It is unnecessary to cite authorities to this Honorable Court that such Rules and Regulations promulgated by both

the President and the Tariff Commission have the full force and effect of law.

Synopsized, the effect thereof when read in connection with the law is that the President was commanded to make certain Findings of Fact and Proclaim them; that his statutory assistant in the performance of that commanded duty was the United States Tariff Commission; that in the particular case as in all cases by general regulation the President directed the Tariff Commission to proceed with the commanded investigation "*in accordance with the law*" * * * and "*under rules and regulations prescribed by the Commission.*" The law provided that in the course of all such investigations the Commission should give reasonable public notice of its *hearings* and reasonable opportunity to interested parties to be present, to produce evidence "*and* to be heard." The Rules and Regulations prescribed by the Commission provided that interested parties appearing should have a right "to examine the Report of the Commissioner or investigator in charge of the investigation *and also the Record* except such portions as relate to trade secrets and processes."

It was further provided by the Commission's Regulations that parties who had previously entered appearances might file briefs and upon permission of the Commission present oral arguments.

It was further likewise provided that the findings of the Commission should be in writing and transmitted "*together with the Record,* certified by the Secretary under the seal of the Commission, to the President for his action under the law."

In this case the Record shows that the Commission did not proceed "in accordance with the law" as directed by the President in that protestant was neither afforded a reasonable opportunity to either "produce evidence" or "be heard." Nor did it, as required by the Rules of the Commission, give interested parties appearing an opportunity to examine either the Report of the Commissioner or inves-

tigator in charge of the investigation, or "the Record." *All evidence as to both domestic and foreign costs of production acted upon by the Commission and the President were withheld from Appellant.*

The Record shows that there was an absolute and complete denial of the interested parties appearing and so requesting at any and all times to examine the Record. There was an absolute and complete denial of the interested parties appearing "to be heard," as that term is defined by the law and decisions of the courts.

The Tariff Commission, therefore, not having proceeded "in accordance with the law," or as required by law, or by its and the regulation of the President, there had been no investigation by the Tariff Commission "in accordance with the law," and therefore no "SUCH investigation" whatever, prior to the President's Proclamation, as by law provided.

Wherefore the statutory command of Congress that no proclamation should be made by the President until "such investigation"—that is to say one in accordance with the law and as commanded by Congress was made, no valid findings or proclamation could be or was made by the President.

Of the several errors assigned by Appellant in the United States Court of Customs and Patent Appeals (R. 1, 2, 3, 4) essentially all thereof, save and except those relating to a denial of the legal rights of Appellant to a "hearing" and "to be present," "to produce evidence," and "to be heard" before the United States Tariff Commission, and that by reason of the very limited time allowed Appellant, September 16 to October 6, to produce evidence in rebuttal of the synopsis of facts submitted by the United States Tariff Commission on the former day which would require the gathering of evidence in different parts of the United States and in Norway, Appellant was denied its statutory right of a "reasonable opportunity to produce evidence," the United States Court of Customs and Patent Appeals disagreed

with the opinion of the lower court and upheld the reasoning and construction contended for by Appellant.

Upon the very important issue as to the legal rights of parties appearing in accordance with a public notice of a "hearing" before the United States Tariff Commission, to wit, the right "to be present, to produce evidence, and to be heard," no better or further argument supporting the contentions of Petitioner herein need be offered than the careful detail resumé of the facts presented by this record and the legal decision thereupon, exceedingly sound rendered by Judge Smith, Judges Robb and Van Orsdel concurring, Court of Appeals of the District of Columbia, in the case of *United States of America ex rel. Norwegian Nitrogen Products Co., Inc., Plaintiff in Error, vs. United States Tariff Commission, Thomas O. Marvin, William S. Culbertson, et al.*, 6 Fed. (2d) 491, rendered upon the identical subject matter and statute here before the Court which, in so far as is here pertinent, is as follows:

> SMITH, Acting Associate Justice. This is an appeal from a judgment of the Supreme Court of the District of Columbia denying relators' petiton praying for a writ of mandamus against the United States Tariff Commission.
>
> Sec. 315 (a) of the tariff act of 1922 empowers the President to ascertain by investigation the differences in cost of production between articles, the growth and product of the United States and like or similar articles, the growth and product of competing foreign countries. If that investigation develops that the duties fixed by the act do not equalize such differences the President is authorized to determine and proclaim the changes in classification or the increases or decreases in the rates of duty provided by the act necessary to equalize foreign and domestic costs of production. Changes in classification and increased or decreased duties so proclaimed by the President take effect under the act within 30 days after the date of their announcement by the President.

Subdivision (c) of section 315 expressly provides that no proclamation shall be issued by the President changing the classification or increasing or decreasing duties until after an investigation of the differences in cost of production has been made by the United States Tariff Commission. That subdivision makes it the duty of the Commission to give public notice of its hearings and to afford to parties interested a *reasonable opportunity* to be present, *to produce evidence and be heard.* The rules, which the Commission is authorized to adopt, prescribe that parties who enter an appearance in the investigations provided for by section 315 shall have the opportunity to examine *the report* of the Commissioner or investigator in charge of the investigation *and* also *the record,* with the exception of such portions of the report or record as relate to trade secrets or processes which section 708 of the act of 1916 forbids the Commission to divulge.

On the 24th of October, 1922, the American Nitrogen Products Company, a Corporation, organized under the laws of the State of Washington, filed with the United States Tariff Commission, a petition and brief praying that the duty of three cents a pound imposed on sodium nitrite by the tariff act of 1922 be increased to 4½ cents per pound. On the 20th of July, 1923, notice was given by the Commission that a public hearing would be held at its office at 10 o'clock a.m., on the 10th of September, 1923, concerning the subject-matter of the petition and that at that time and place the parties interested would be given an opportunity to *be present,* to *produce evidence* and to *be heard* as to differences in cost of production and as to all other facts and conditions pertinent to the matters which were then to be the subject of investigation.

On the 10th of September, 1923, the Norwegian Nitrogen Products Co., appeared before the Commission *and made a formal request that it be given a copy of the petition which initiated the investigation and which was filed by the American Nitrogen Products Company.* To that request the American Nitrogen Products Company objected on the ground that ALL *information* given to the Commission *as to* its *capital assets* and

costs of production was confidential and *was furnished on the promise that it would be so treated by the Commission.* The Chairman announced that "the Commission has considered that when anyone submits information to it which it declared to be *confidential* it shall observe the *confidential relation.*"

On the 11th of September, 1923, the Norwegian Nitrogen Products Company *in writing* formally requested that it be supplied by the Commission with *all facts* submitted to the Commission and also with a *complete* copy of the petition in order that the Company might *be heard* on the matters set forth therein. In the written request was included a brief in which it was stated that the Norwegian Nitrogen Products Company was entirely in the dark as to the real case and actual facts presented to the Commission by the American Nitrogen Products Company and that therefore the opposition to the petition was not in a position to meet the case or the facts so presented. The brief also urged that until the opposition had information as to all matters and every particle of evidence *not trade secrets* submitted to the Commission, no valid finding by the Commission could be had. The Commission ruled that it had obtained its cost data under *pledges of confidence* and that it could not violate those pledges of its own motion. The Commission therefore declined to accede to the request of the opposition.

The Commission furnished to the appellant the application of the American Nitrogen Products Company for an increase of duty, from which application however *was deleted all data* as to *costs of production* AND *all matter deemed to be confidential by the Commission.* Appellant was also favored with a so-called *summary* of information in which it was stated that the domestic price of soda ash, an important material in the manufacture of sodium nitrite, was on September 10, 1925, $1.45 per 100 pounds in bags at makers' works; that the normal consumption of sodium nitrite in the United States was about 6,000,000 pounds per year, and that domestic producers had plant capacities equal to about 87 per cent of that requirement; that from 1¾ to 3½ million pounds of sodium nitrite were

imported annually during the period 1914 to 1921 excepting the year 1920, in which year 11,690,000 pounds came into the country from abroad; that 50 per cent of the demand for sodium nitrite in the United States was supplied by imports; that during the 4th quarter of 1922, 1,460,528 pounds of sodium nitrite were imported at an average declared value of 4 cents per pound; that during the first 6 months of 1923, 3,647,125 pounds of nitrite were imported at an average declared value of 4.4 cents per pound; that the exports of sodium nitrite from Norway to the United States during March, April, and May, 1923, were 1,070,000 pounds; that the average invoice value was 4.84 cents per pound c. i. f. New York, from which was deducted packing, inland freight, ocean freight and insurance, leaving an average price at the factory in Norway 4.34 cents per pound. An estimate of the cost of producing sodium nitrite in Norway was also supplied. *With the exception of freight rates on soda ash and the domestic price thereof no information whatever was apparently given to the appellant as to the domestic cost of producing sodium nitrites.* After receiving the summary of information the opposition *again demanded 1st, a reasonable opportunity to inspect and to be heard upon all evidence which had been offered in the case, not deemed by the Commission to be trade secrets, and not, in fact, trade secrets or processes; 2nd, an inspection of all the evidence* in the possession *of the Commission* as to the *cost of power* used in the United States for the production of nitrite; 3rd, information as to the evidence submitted *to the Commission* concerning the *number of laborers employed by the American Nitrogen Products Company and the wages which they received;* 4th, inspection of the evidence submitted *to the Commission* as to the *capital invested* by the American Nitrogen Products Company; 5th, an opportunity to *cross-examine the experts* of the Commission *as to the evidence submitted by them to the Commission.*

The Commission ruled that it would permit the opposition to be heard and to introduce any evidence that it might have, but that it *would not supply any information whatever in addition to* that furnished by its

summary of information. Inspection by the opposition of any original or primary data collected by the Commission and cross-examination of the Commission's investigators as to any of the information secured by them was also refused. *The capital invested by the American Nitrogen Products Company, the value of its plant, the number of laborers employed by the Company, the wages paid and all details as to the cost of production of nitrites was held by the Commission to be confidential information, to which the opposition was not entitled.*

While the investigation of the differences of costs of production of sodium nitrite in the United States and in competing countries *was still pending before the U. S. Tariff Commission* and before its report as to the results of the investigation had been transmitted to the President, the relator on the 12th of September, 1923, filed in the Supreme Court of the District its petition for a writ of mandamus which recited in substance the facts hereinbefore stated and prayed 1st, that a rule or order be granted directing the Tariff Commission and its members to appear and show cause why a writ of mandamus should not issue requiring them to permit the relator to examine the petition of the American Nitrogen Products Company and all data or information or evidentiary matter on file with the Commission respecting the cost of producing sodium nitrite at the plant of said American Nitrogen Products Co. whether in the United States or out of it; 2nd, that the Tariff Commission and its members show cause why a public hearing should not be allowed at which the relator and any person or corporation appearing before the Commission, having an interest in the subject-matter, should have the right and opportunity (a) to cross-examine the investigators, experts, agents and witnesses who may have supplied data, information or evidentiary matter to the Commission; (b) to offer evidence in contravention of such data, information and evidentiary matter; (c) to present arguments and representations against said petition and against the probative and legal value of any and all data, information and evidentiary matter on file with the Commission upon which the American Nitrogen Products Company

based its application for an increase of duty on sodium nitrite.

The Supreme Court issued an order to show cause in accordance with the prayer of the petition and in response to the order the Tariff Commission filed its answer in which the demands made by the relator and the rulings thereon as hereinbefore set out were substantially admitted. To the answer a demurrer was filed which was overruled by the court and the relator electing to stand upon its demurrer the court on the 28th of April, 1924, ordered, adjudged and decreed that the prayer of the petition be denied and the petition dismissed. From that judgment this appeal was taken.

After the denial of the petition for mandamus and the dismissal of the petition, the Tariff Commission submitted to the President a report of its investigation of the cost of production of sodium nitrite in the United States and the production, cost thereof in Norway, the principal competing country. Subsequent to that report and on May 6, 1924, the President issued a proclamation in which was recited the investigation made by the Tariff Commission and the President's finding that the costs of production in the United States and Norway, the principal competing country, were not equalized by the duties imposed by Congress on sodium nitrite.

The proclamation also declared that it was necessary to increase the duty on sodium nitrite from three cents to 4½ cents per pound in order to equalize costs of production and accordingly advanced the duty on sodium nitrite from 3 cents to 4½ cents per pounds.

The Tariff Commission contended in the lower court and contends here that Section 315 of the Act of 1922 requiring the Commission to give reasonable public notice of its hearings and a reasonable opportunity to interested parties to be present and produce evidence and to be heard, grants to the interested parties nothing more than the right to present to the Commission such evidence as they may have and to argue their case. We cannot agree with that contention.

Under the act of 1916 the Tariff Commission was a mere investigative body charged with the duty of gathering tariff information and submitting the same

whenever required to the President, the Committee on Ways and Means of the House and the Committee on Finance of the Senate. Unquestionably under that act the Tariff Commission might hear or not hear interested parties and whether it heard or refused to hear them no harm could come to any one inasmuch as no change of duty could be accomplished without the intervention of Congress. Congress was not bound by anything that the Commission might do, say, recommend or find and was entirely free to practice investigations on its own account and to reach a conclusion as to the facts and the inferences to be drawn therefrom utterly at variance with that reported by the Commission.

Section 315 of the Tariff Act of 1922 however sought to make the dutiable list more flexible by giving to the President in certain contingencies and after investigations made by the Tariff Commission the power to change the rates of duty fixed by Congress. Under that Section the rates of duty prescribed by statute may be increased or decreased 50 per cent by the President. That is a very large grant of power if grant it be and for its exercise nothing is required except an investigation and report by the Tariff Commission.

For the correctness of his decision the President must rely on the Commission's fairness, its knowledge of the facts as they are and the verity of its findings and report. For the accuracy of its report and the wisdom of its recommendations, the Commission in its turn depends on ex parte testimony taken by it and on the unverified reports of its investigators in the field after such testimony and reports have been subjected to the test of the *hearing which the statute and the Commission's rules prescribed.*

For the purposes of Section 315 the Commission is no longer left free to hear whom it pleases or what it pleases. It is required by law to give reasonable public notice of the hearing prescribed by the section and to give reasonable opportunity to parties interested to be present, to produce evidence and to be heard. That notice and the right of interested parties to be present, to produce evidence and to be heard, was not

designed as the Commission contends to aid the Commission in getting the economic facts. The Commission needed no such help inasmuch as the act of 1916 as originally passed furnished to that body adequate and effective means to secure all data, evidence, facts information and apparently even trade secrets and processes pertinent to its inquiries. (See Section 706 and 708 of the Act of September 8, 1916 (39 Stat. 797-798.)

The right of interested parties to be present, to produce evidence and to be heard at the hearings contemplated by section 315, *was granted by Congress and not by the Commission. That right was conceded to adverse interests to protect them against the abuses of ex parte hearings and proceedings and against ex parte statements and evidence which if made known to those opposing a change in rate, might be discredited, controverted or refuted.*

The Commission in the exercise of the authority conferred upon it by the act of 1916, through its investigators gathered data as to *capital investment, cost of power, wages paid to labor and the cost of production of nitrites in the United States and abroad.* Its refusal to disclose any of that information with the exception of the price of soda ash reduced to little better than an empty form the right of the opposition to be present to produce its evidence *and to be heard.*

Of what value to the opposition was the right to produce evidence if the opposition knew nothing of the data collected by the Commission or of the facts or evidence submitted to the Commission for its consideration in reaching a conclusion as to the cost of production of nitrites? Just how was the opposition to meet the petition of the American Nitrogen Products Company if the former was not permitted to see the petition of the latter and was supplied with nothing better than a deleted copy from which was omitted every material allegation as to the costs of production set out in the petition actually filed with the Commission? Of what use to the opposition was the right to introduce evidence on its part and to argue the case if it had no knowledge of the data gathered by the

Commission or of the information submitted by the American Nitrogen Products Company or of the issue raised by the petition and the evidence.

To hold that the right to be heard means simply the right to produce evidence and to argue the case would leave interested parties at the mercy of those who initiated the proceeding and render useless the safeguard which Congress manifestly interposed to protect importers, merchants, industrials, consumers and even the Commission itself from unreliable data, insufficient evidence and mistaken conclusions of fact.

Barring trade secrets and processes the disclosure of which is expressly forbidden, THE OPPOSITION BY VIRTUE OF ITS STATUTORY RIGHT TO BE HEARD, WAS ENTITLED TO BE INFORMED OF THE FACTS AND EVIDENCE PRIVATELY PRESENTED TO THE COMMISSION for its consideration. St. Louis, Southwestern R. R. Co. v. I. C. C., 264 U. S. 64, 78. Indeed, *under the rules of the Commission* itself, the Norwegian Nitrogen Products Company should have been given an opportunity *to examine the record and the reports* of the Commission or investigator in charge of the investigation.

The term "trade secrets" as ordinarily understood, means an unpatented secret commerciably valuable plan, appliance, formula or process which is used for the making, preparing, compounding, treating or processing of articles or materials which are trade commodities. In re Bolster, 59 Wash. 655; National Tube Co. v. Eastern Tube Co., 3 Ohio (C. R.) 459, 462, 464.

There is nothing in the record showing and the appellee does not claim that the making known of any of the costs of production involved the disclosure of any unpatented, secret commercially valuable plan, appliance, formula or process used for the making, preparing, compounding, treating or processing of articles or materials. *For the purposes of this case therefore, the costs of production demanded by the opposition cannot be regarded as trade secrets.*

Costs of production of and by themselves are simply matters of business privacy, the disclosure of which is not forbidden by section 708 of the act of 1916.

Business privacy will be protected, it is true, from more fishing expeditions in search of evidence (Federal Trade Commission v. American Tobacco Co., 264 U. S. 298, 305-306) and from the prying scrutiny of those who have no higher motive than curiosity, illicit gain or malice. The disclosure of matters of business privacy may be compelled however if such matters be material and relevant evidence for the protection of the public or for the determination of the rights of interested parties by a legally constituted tribunal or body authorized to procure and consider such evidence. Bank of Columbus v. Okely, 4 Wheat. 235-244; United States v. Louis. & Nash. R. R., 236 U. S. 318.

As the Commission denied to the appellant access to facts, data, information and reports which it had received for consideration as to the cost of producing nitrites in the United States on the sole ground that such facts, data, information, evidence and reports were confidential and as it does not appear from the record or the finding of the Commission that the examination thereof involved the disclosure of any unpatented, secret, commercially valuable plan, appliance, formula or process used for the making, preparing, compounding, treating or processing of nitrites, *we are of the opinion that the appellant was deprived of the right to be heard as contemplated by the statute.*

Notwithstanding the fact, however, that the appellant was not given the hearing prescribed by section 315, we are convinced that the granting of the writ prayed for would afford to the appellant no substantial relief. The purpose of the investigation made by the Commission in this case was to furnish to the President information which would enable him to determine differences in costs of production, and to fix within the limits prescribed by statute a rate of duty which would equalize such differences. The Commission has made its investigation and reported the results thereof to the President. The President has already acted on that report found the differences in costs of production and made his decision as to the rate of duty which would equalize such differences.

Mandamus to the Commission requiring it to make the disclosure demanded in order that the appellant

might be properly heard, would not in any way modify, affect or violate the rate of duty fixed by the President or compel him to fix a new rate or to restore the rate prescribed by the act of 1922.

* * * * * * * * *

If the Commission had made its report to the President in violation of a valid restraining order or writ of injunction, the appellant would not have been left without a remedy and the court would be diligent in its endeavors to correct as far as the law permitted, the wrong resulting from a contemptuous disregard of its orders. The cases cited by the appellant fully sustain that doctrine, but as no restraining order of any kind was in force at the time the report of the Commission was made to the President, the citations upon which the appellant relies are inapplicable to this case.

The judgment appealed from is affirmed with costs. (Italics ours.)

That said decision was "upon the merits" was declared by this Court. *United States of America ex rel. Norwegian Nitrogen Products Co., Inc., Plaintiff, v. The United States Tariff Commission, et al.*, 274 U. S., 106. Said decision was not *obiter dictum.*

The precise point has been decided by the Supreme Court of the United States repeatedly. It will suffice to quote from *Railroad Companies v. Schutte,* 103 U. S. 118, wherein the identical point was passed upon by that court, stating:

"As to the first question, we deem it sufficient to say that the Supreme Court of Florida has distinctly decided that in the case of this company, as well as the other, the statutory authority was complete. The point was directly made by the pleadings and as directly passed on by the court. Although the bill in the case was finally dismissed because it was not proved that any of the State bonds had been sold, *the decision was in no just sense dictum. It cannot be said that a case is not authority on one point because, although that*

> *point was properly presented and decided in the regular course of the consideration of the cause, something else was found in the end which disposed of the whole matter.* Here the precise question was properly presented, fully argued, and elaborately considered in the opinion."

See also *Meyers v. United States,* 272 U. S. 220; *Union Pacific Co. v. Mason City Co.,* 199 U. S. 166; *United States v. Title Insurance Co.,* 265 U. S. 472, 486.

The decision of the United States Court of Customs and Patent Appeals here sought to be reviewed gives to the words "to be present, produce evidence *and* to be heard" the right "to be present" and "to produce evidence" *only,* thereby reading out of the Act any office, force or effect for the words "to be heard". It likewise denies the word "hearing" as used in the Act its well-settled legal scope. That one cannot be "heard" in a case, or that there can be a legal "hearing" upon a subject matter, without examination or knowledge of all the evidence in the record, is so well settled that it seems almost trite of statement or citation. It is uniformly so held. *Interstate Commerce Commission v. Louisville & Nashville R. Co.,* 227 U. S., 88-93, and numerous cases cited. *Monroe Gas & Fuel Co. v. Michigan P. U. Co.,* 292 Fed. Rep., 139-148; *St. Louis Railway Co. v. Interstate Commerce Commission,* 264 U. S., 64; *Atchison, Topeka & Santa Fe R. R. Co. v. United States, &c.* (decided January 4, 1932), 284 U. S., 248).

The Supreme Court of the United States in *Interstate Commerce Commission vs. Louisville & Nashville R. Co.,* 227 U. S. 88 at page 93, interpreted the meaning of the word "hearing" as used in such and similar acts, numerous citations therein in support of the text of said decision being cited, stated:

> "The Government further insists that the Commerce Act (38 Stat. 743) requires the Commission to obtain information necessary to enable it to perform the

duties and carry out the objects for which it was created, and having been given legislative power to make rates it can act, as could Congress, on such information, and therefore *its findings must be presumed to have been supported by such information*, even though not formally proved at the hearing. But *such a construction would nullify the right to a hearing*, for manifestly *there is no hearing when the party does not know what evidence is offered or considered* and is not given an opportunity to test, explain, or refute. The information gathered under the provisions of Sec. 12 may be used as basis for instituting prosecutions for violations of the law, and for many other purposes, *but is not available, as such, in cases where the party is entitled to a hearing.* The Commission is an administrative body, and even where it acts in a quasi-judicial capacity, is not limited by the strict rules, as to the admissibility of evidence, which prevails in suits between private parties. *Int. Com. Comm. v. Baird*, 194 U. S. 25. But the more liberal the practice in admitting testimony, the more imperative the obligation to preserve the essential rules of evidence by which rights are asserted or defended. *In such cases the Commissioners can not act upon their own information as could jurors in primitive days. All parties must be fully apprised of the evidence submitted or to be considered, and must be given opportunity to cross-examine witnesses, to inspect documents, and to offer evidence in explanation or rebuttal.* In no other way can a party maintain its rights or make its defense. In no other way can it test the sufficiency of the facts to support the finding; for otherwise, even though it appeared that the order was without evidence, the manifest deficiency could always be explained on the theory that the Commission had before it extraneous, unknown but presumptively sufficient information to support the finding. *United States v. Baltimore & Ohio S. W. R. R.*, 226 U. S. 14."

It will be particularly noted that the Supreme Court in that case at page 91, held, that where a "hearing" is so provided and is not so held as to *all the data* upon which

decision is based *the order of the tribunal made without such hearing is null and void.* The Court then continued:

> "In the comparatively few cases in which such questions have arisen it has been distinctly recognized that administrative orders, quasi-judicial in character, *are void if a hearing was denied; if that granted was inadequate or manifestly unfair;* if the finding was contrary to the 'indisputable character of the evidence.' Tang Tun v. Edsell, 223 U. S. 673, 681; Chin Yoh v. United States, 208 U. S. 8, 13; Low Wah Suey v. Backus, 225 U. S. 460, 468; Zakonaite vs. Wolf, 226 U. S. 272; or if the facts found do not, as a matter of law, support the order made; United States v. B. & O. S. W. R. R., 226 U. S. 14; Cf. Atlantic C. L. v. North Carolina Corp. Com., 206 U. S. 1, 20; Wisconsin, M. & P. R. Co. v. Jacobson, 179 U. S. 287, 301; Oregon Railroad v. Fairchild, 224 U. S. 510; I. C. C. v. Illinois Central, 215 U. S. 452, 470; Southern Pacific Co. v. Interstate Com. Comm., 219 U. S. 433; Muser v. Magone, 155 U. S. 240, 247." *Mitchell Coal Co. v. Pennsylvania R. R. Co.,* 230 U. S. 282; *Louisville & Nashville R. R. Co. v. Bosworth,* 209 Fed. Rep. 380-445; *Atchison, Topeka & Santa Fe R. R. Co. v. Spiller,* 246 Fed. Rep. 18; *Abilene & S. R. R. Co. et al. v. U. S.,* 288 Fed. Rep. 102-110.

That this Act and the like provisions of the Interstate Commerce Act are comparable for purposes of judicial interpretation is supported by *J. W. Hampton, Jr. & Co. v. The United States,* 276 U. S., 394, wherein this Court sustained the constitutionality of this Act in part citing in support thereof similar delegation of powers in the Interstate Commerce Act and decisions thereupon. Indeed, the decision of the court below is obviously predicated upon an entire misconception of the Congressional and legal theory of the flexible tariff, to wit, in assuming that the Act delegates to the President and the Commission the power *to fix rates of duty;* whereas, as shown by the Act, as pointed out by the Attorney General and by this Honorable Court in the

Hampton case, supra, Congress itself by the Act fixes and lays the rate of duty and delegates only the power to find and translate into figures and proclaim the facts prescribed by Congress thus putting into effect such rates. In the *Hampton case,* upholding the constitutionality of this Act, this Court particularly emphasized this legal effect of the Act and the inclusion therewithin of the right "to be heard," saying (276 U. S., 405):

> "*The Tariff Commission does not itself fix duties,* but before the President reaches a conclusion on the subject of investigation *the Tariff Commission must make an investigation and in so doing must give notice to all parties interested to appear, to produce evidence, and to be heard.*" (Italics ours.)

Wherefore, review by this Honorable Court is respectfully urged that the almost daily denial by the United States Tariff Commission of the claimed rights of numerous trade and labor organizations and great commercial bodies of the United States by reason of conflict of decisions in the two highest courts of present decision with reference thereto be by this Court finally determined.

Very respectfully submitted,

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Dated, July 25, 1932.

EXHIBIT "A."

Section 315 (a) and the here pertinent part of Section 315 (c), Tariff Act of 1922, 42 Stats. 941; U. S. C. Tit. 19, Sec. 154:

"SEC. 315. (a) That in order to regulate the foreign commerce of the United States and to put into force and effect the policy of the Congress by this Act intended, whenever the President, upon investigation of the differences in costs of production of articles wholly or in part the growth or product of the United States and of like or similar articles wholly or in part the growth or product of competing foreign countries, shall find it thereby shown that the duties fixed in this Act do not equalize the said differences in costs of production in the United States and the principal competing country he shall, by such investigation, ascertain said differences and determine and proclaim the changes in classifications or increases or decreases in any rate of duty provided in this Act shown by said ascertained differences in such costs of production necessary to equalize the same. Thirty days after the date of such proclamation or proclamations such changes in classification shall take effect, and such increased or decreased duties shall be levied, collected, and paid on such articles when imported from any foreign country into the United States or into any of its possessions (except the Philippine Islands, the Virgin Islands, and the islands of Guam and Tutuila): *Provided,* That the total increase or decrease of such rates of duty shall not exceed 50 per centum of the rates specified in Title I of this Act, or in any amendatory Act.

* * * * * * * * *

"(c) * * * Investigations to assist the President in ascertaining differences in costs of production under this section shall be made by the United States Tariff Commission, AND NO PROCLAMATION SHALL BE ISSUED UNDER THIS SECTION UNTIL SUCH INVESTIGATION SHALL HAVE BEEN MADE. The commission shall give *reasonable public notice* of its *hearings* and shall give *reasonable oppor-*

tunity to parties interested to be present, to produce evidence, and to be heard. The commission is authorized to adopt such reasonable procedure, rules, and regulations as it may deem necessary.

* * * * * * * * * *"

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1932.

No. 272.

NORWEGIAN NITROGEN PRODUCTS COMPANY, *Petitioner*,

v.

THE UNITED STATES.

On Petition for a Writ of Certiorari to the United States Court of Customs and Patent Appeals.

PETITIONER'S REPLY TO BRIEF FOR THE UNITED STATES.

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I.

That jurisdiction of this Court is herein duly invoked is admitted by the United States (Brief U. S. p. 2).

The question raised by the United States (Brief p. 2) as to which of the two Acts gives the Court jurisdiction is not necessary of determination in granting the writ sought so long as either Act so authorizes.

II.

The statement by the United States (Brief p. 3) is challenged. It reads:

> "In its petition and brief in the present case (pp. 4, 16, 17) the petitioner claims that the commission did not afford to *the petitioner reasonable opportunity to produce evidence and to be heard.* The record, however, shows clearly that, unless the company had a right to inspect data which had been submitted to the commission in confidence, *it was given all reasonable opportunity which could be given by the commission to contest the requested increase in duty.* The case, therefore, turns upon the question whether the company had a right to inspect such data." (Italics ours.)

It *assumes* in a single sentence, unsupported by citation of law or argument, the correctness of the Government's legal contention as to one of the several important issues in the case, to wit, that petitioner was given reasonable opportunity to produce evidence and to be heard. That the Government's legal contention upon this issue in this case is *erroneous* in all particulars has been decided by the Court of Appeals of the District of Columbia in *United States of America ex rel. Norwegian Nitrogen Products Company, Inc., Plaintiff in Error, v. United States Tariff Commission, et al.* (6 Fed. 2d. 491), which decision was expressly left undisturbed on appeal by this Court (274 U. S., 106).

The records shows that Petitioner's statutory rights were denied and due exception thereto granted. In *many* particulars in addition to the denial of the right to inspect data (R. 147, 148, 149) before the Commission. Said issues cannot be duly or appropriately presented or fairly decided on this petition, answer and reply. They, however, vitally concern very important rights of great commercial interests of the United States being presented and denied almost daily in the proceedings of the United States Tariff

Commission for want of clear and final adjudication thereof this Court.

III.

The United States, in its brief from the middle of page 3 to the middle of page 16, argues that the mere recital by this Court of some of the facts of the case, when previously before it and decided on an entirely different issue from that here presented, *Norwegian Nitrogen Products Co., Inc. v. United States Tariff Commission, et al.*, 274 U. S. 106, is a decision of the issues herein presented; whereas, this Court therein, after reciting certain facts, expressly stated of the decision of the court below, which held squarely against the contention of the Government there and here (6 Fed. 2d 491), that the court "reviewed the case at length *and announced its conclusion on the merits.*"

While quoting the foregoing, the Government significantly omits the further statement in this Court's decision making it very clear that this Court did not essay to decide this issue there and here presented, expressly stating with reference thereto "which *we* do not decide." (274 U. S., 111, 112.) Thereby it is shown that this Court expressly refused to decide the case on the merits, and intentionally and explicitly refused to disturb the "conclusion on the merits" reached therein by the Court of Appeals of the District of Columbia. (6 Fed. 2d. 491.)

Every argument herein offered by the Government on the merits of the case is squarely decided against it in said decision of the Court of Appeals of the District of Columbia, the sound logic and legal exposition of which decision the Government seeks to here avoid by claiming the same *dictum.*

IV.

The United States, in its brief (pp. 16, 17), concludes:

> "*The question is one of general importance,* but we believe it has been correctly decided in the Court of

> Customs and Patent Appeals. There is no existing conflict of decisions, but the *dictum* in the Court of Appeals of the District leaves the law uncertain in the courts of the District and a conflict is quite likely to arise in pending litigation. While we do not believe this is a case which falls within the rules of practice of this Court in granting writs of certiorari, *we are not disposed to oppose the granting of a writ* if in the exercise of its discretion the Court deems the case worthy of review. (Italics ours.)

Before decision below, the United States filed a certificate that the case was of that importance to warrant review by this Court (R. 199, 200). If that were true then, the fact that the Government prevailed below does not change the importance of the case. If it were of that importance then, it so remains and any opposition by the Government, even so feeble as here, may well be deemed a self-challenge to the candor of its previous representation to this Court.

The foregoing statement by the United States that the decision of the Court of Appeals of the District of Columbia (6 Fed. 2d. 491), is "*dictum,*" without any pretense of supporting legal authority or logical reason, is directly in conflict with the aforesaid statement of this Court, when considering the same on appeal (274 U. S., 106), that the lower court in rendering said decision "reviewed the case at length and *announced its conclusion on the merits.*" That holding by this Court, and that said decision is not *dictum,* is in exact accord with the long-settled doctrine of this Court in *Railroad Companies v. Schutte,* 103 U. S., 118, quoted in the petition herein at page 28, and the many like decisions therein cited, page 29. There is a direct conflict between this and the decision here sought to be reviewed, for which see Record 200-213.

V.

The United States, in its brief, p. 16, offers the following cogent reason why this petitioned writ *should be* granted. It states:

"There is now pending in the Supreme Court of the District of Columbia a case in which *one business organization is seeking to secure from the Tariff Commission information which rival business organizations gave to the Commission in confidence.* The Supreme Court of the District of Columbia may feel constrained to follow the dictum announced by the Court of Appeals of the District of Columbia." (Italics ours.)

Since counsel for petitioner herein is counsel for the petitioners in said proceeding, it would seem appropriate and incumbent to counteract any prejudice lodged by said statement by stating the facts: The "*one* business organization" which the Government charges therein with seeking to secure confidential information of "rival business organizations," as shown by the pleadings, includes of record more than 150 agricultural organizations and individuals, an important segment of practically all the great farm organizations of the United States; not for the purpose of reprehensively, as might be implied by said statement, prying into the affairs of rival business organizations, who happen to be importing competitors, but in the exercise of their statutory rights granted by Congress and deemed by them denied by the Commission, in a legal and laudable effort to maintain the competitive capacity of one of our greatest American agricultural industries, cheese production, which is vitally threatened by disastrous foreign competition. That proceeding is not a reprehensible quest of business secrets. There are none such unknown to these petitioners. It is an effort authorized by statute to maintain commercial existence by one of our great American agricultural industries, a substantial unit of our national body commerce.

It may with propriety be further stated to the Court that in said proceeding the Commission, *in pursuance of an intimation by this Court* (274 U. S., 106), is restrained by injunction from further proceeding in the matter until this

Court shall have finally decided the important issue *therein* and *herein* presented, to wit, what are the rights of interested parties appearing before the United States Tariff Commission under that provision of the flexible tariff which grants such parties the right in such proceedings to a "hearing," "reasonable notice thereof," "to be present, to produce evidence and to be heard" thereat? It may fairly be assumed that many important industries now haled before the Commission to defend existing, or appearing before it seeking different, tariff duties will likewise restrain the Tariff Commission from proceeding, as it constantly so persists, in a manner which, as to interested parties appearing absolutely reads out of the law and denies them their aforesaid statutory rights.

The appearance below of interested organizations, as well as the great array of petitioners in said District Supreme Court cases, bear witness to the great volume of American industry and labor that believes the rights Congress here gave are being denied and that final decision thereupon by this Court will insure grant of their rights.

The issue, therefore, is one of great public importance, final decision of which can be had solely by this Court. Such can most speedily be had by the granting of this writ and early decision of this case.

It may appropriately be said that this is one of several decisions of the Court of Customs and Patent Appeals upon the subject of the flexible tariff, its constitutionality and its due exercise, which, if reviewed and finally adjudicated by this Court, will at the same time and most speedily set at rest many questions as to the legality and proper procedure of the Tariff Commission and thereby greatly facilitate the highly important business of the Commission. These cases are, in the order of their docketing: No. 241, *Henry Blandheimer v. United States;* No. 261, *S. Leon & Company v. United States;* No. 262, *Fox River Butter Co. v. United States,* and No. 272, *Norwegian Nitrogen Products Co. v. United States* (the instant case).

The issues herein are not presented in any of the other cases. By granting this writ the Court will have the advantage of having before it all phases of these related controversies, and of disposing of them at the same time.

It is respectfully submitted that this is a case presenting questions of great and general importance, wherein there is a direct conflict of decision thereupon between the two co-ordinate courts next in authority of decision to this Court, and, therefore, as suggested by the Government in that situation (brief, pp. 17, 18) and urged by petitioner, worthy of review by this Court.

The conduct of business of an important branch of the Government is being delayed and may be seriously arrested until final decision by this Court of the issues herein presented.

Very respectfully submitted,

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September, 1932.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1932.

No. 272.

NORWEGIAN NITROGEN PRODUCTS COMPANY, INC., *Petitioner*,

v.

THE UNITED STATES, *Respondent*.

IN ERROR TO THE UNITED STATES COURT OF CUSTOMS AND PATENT APPEALS.

BRIEF FOR PETITIONER.

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PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1932.

No. 272.

NORWEGIAN NITROGEN PRODUCTS COMPANY, INC., *Petitioner,*

v.

THE UNITED STATES, *Respondent.*

CERTIORARI TO THE UNITED STATES COURT OF CUSTOMS AND PATENT APPEALS.

BRIEF FOR THE PETITIONER.

(Supplemental to the Petition and Brief for the Writ.)

STATEMENT OF THE CASE.

This case is here on Certiorari to the United States Court of Customs and Patent Appeals to review a judgment which affirmed a judgment of the United States Customs Court construing the rights accorded by statute to interested

parties, appearing at a public "hearing" by the United States Tariff Commission, "to be present, to produce evidence and to be heard," and the appropriate remedy for review of the denial of such statutory rights, under the flexible tariff as provided in Sec. 315 (a), Tariff Act of 1922 (42 Stats. 942; U. S. Code Title 19, Sec. 156). These provisions are essentially the same as provided by the current flexible tariff re-enacted as Sec. 336, Tariff Act of 1930 (46 Stats. 701; U. S. C. Tit. 19, Sec. 1336, 1931 Supp.) Both are here considered in connection with Sec. 708, Title VII, of the Revenue Act of 1916 (39 Stat. 798; U. S. C. Title 19, Sec. 1335, 1931 Supp.) The pertinent parts are as follows:

The applicable statutes (Act of 1922) are (42 Stat. 941):

> "SEC. 315. (a) That in order to regulate the foreign commerce of the United States and to put into force and effect the policy of the Congress by this Act intended, whenever the President, upon investigation of the differences in costs of production of articles wholly or in part the growth or product of the United States and of like or similar articles wholly or in part the growth or product of competing foreign countries, shall find it thereby shown that the duties fixed in this Act do not equalize the said differences in costs of production in the United States and the principal competing country he shall, by such investigation, ascertain said differences and determine and proclaim the changes in classifications or increases or decreases in any rate of duty provided in this Act shown by said ascertained differences in such costs of production necessary to equalize the same.
>
> * * * * * * * * *
>
> "(c) * * * Investigations to assist the President in ascertaining differences in costs of production under this section *shall be made by the United States Tariff Commission*, and *no proclamation shall be issued under this section until such investigation shall have been made*. The commission shall give *reasonable public notice* of its *hearings* and shall give *reasonable opportunity to parties interested to be present, to*

produce evidence, and to be heard. The commission is authorized to adopt such reasonable *procedure, rules,* and *regulations* as it may deem necessary. (Italics ours.)
* * * * * * * * * * ".

That Sec. 708 of Title VII of the Revenue Act of 1916 (39 Stats. 798) provides:

> "Sec. 708. It shall be unlawful for any *member* of the United States Tariff Commission, or for any *employee, agent,* or *clerk* of said Commission, or any other officer or employee of the United States, to divulge or to make known *in any manner whatever not provided for by law,* to any person, *the trade secrets or processes* of any person, firm, copartnership, corporation, or association embraced in any examination or investigation conducted by said Commission, or by order of any member thereof. Any offense against the provisions of this section shall be made a misdemeanor and be punished by a fine not exceeding one year, or both, in the discretion of the court, and such offender shall also be dismissed from office or discharged from employment. * * *." (Italics ours.)

Bearing in mind that the foregoing are member provisions of the same act, to wit, the Tariff Act of 1922, it will be instructive of the purpose of Congress to read the several provisions together so as to give some separate and distinct force and effect to each thereof in accordance with the well-known rule of statutory construction to that effect.

It should be borne in mind that Section 708 of the Revenue Act of 1916 was enacted by Congress long before the Commission was invested with the power and directed to hold "hearings" as provided by Section 315 (e), Tariff Act of 1922. It will be noted particularly that said Section 708 is confined to *members* of the United States Tariff Commission, *employees, agents* and *officers* thereof. It does not extend in language to the *Commission as such.* That this limitation of the provisions of Section 708 was advisedly

so enacted is shown by the internal construction of the *various* provisions *in pari materia.* Thus Section 701 and Section 706 of the Act of 1916 are extended to "the Commission." Likewise in Section 708 Congress speaks of "an investigation conducted by said Commission or by order of said Commission." At the time of this amendment, therefore, Congress had clearly in mind the difference between acts of the Commission and acts of a member or agent of the Commission, and differentiated between them in prescribing the duties, powers and inhibitions set forth in these paragraphs.

The rights of interested parties prescribed in Section 315 (c) are therein imposed as duties of "the Commission" and are invested as rights which must be accorded *by the Commission,* not at all times, but only attaching to and during "its hearings". Obviously there is a sound and logical reason why Congress might desire to inhibit a member or agent of a Commission quietly and clandestinely disclosing trade secrets thereof, and at the same time would not attach that inhibition to the more solemn proceedings of the Commission itself when invoked by an applicant seeking favors, sitting as such and acting according to combined wisdom of all or a majority of its members. That is true of similar provisions of the Interstate Commerce acts, *infra.*

Moreover, Section 315 was the investment of an entirely new duty and function upon the Commission as a part of a legislative scheme to take tariff making away from the secretiveness of committees of Congress and place it within the powers, in so far as the investigations at least were concerned, of a *public tribunal* empowered and directed to hold *public hearings,* to administer oaths, and to take evidence and sift facts. It marked the difference between secret proceedings of the committees of Congress and the public proceedings of an independent commission.

It is expressly provided in Section 708 that *members* and *officers* of the Commission but not the Commission as such

shall not "divulge or make known in any manner whatever *not provided for by law* the trade secrets or processes of any firm," etc. In that status we are to read the two provisions of law together giving full force and effect to each, which can be done, and can be done only by applying Section 708 in all cases except where not otherwise by law provided, such as in 315 (c) when the Commission as such is holding one of "its hearings."

The penalty prescribed by Section 708 is obviously a personal penalty running to individuals and not intended to apply to the Commission acting as such. The statutory deduction, therefore, is that, reading all of these provisions together, Section 708 does not apply in cases where *the Commission* is conducting one of its hearings, and that in such cases the right to be heard accorded interested parties thereat appearing is a right unlimited by the statute, and consequently a right to be heard upon all, and not a part, of the evidence upon which the Commission intends proceeding to its conclusion including trade secrets and processes except as might be prohibited by common law.

(It will be noted in passing that a precisely analogous statute inhibiting under penalty "examiners" for the Interstate Commerce Commission from divulging certain facts (Sec. 20, Interstate Commerce Commission Act 1906, 34 Stats. 504) does not extend to divulgence thereof at the "hearings" of the Commission or courts, provided by Sec. 15 of the Act as amended June 18, 1910, (36 Stats. 552), as construed by this Court in *Interstate Com. Com. v. Louisville & Nashville R. Co.*, 227 U. S., 88-93.) The policy of Congress, therefore, seems to thus limit this inhibition.

There is a sound reason supporting this differentiation. Congress did not intend investigators tattling to competitors secrets ascertained by them; but did intend that when an application for an increased or decreased duty laid by Congress was being investigated whereby the public revenues might be affected or domestic interests destroyed,

upon the grounds that the applicant's costs were more or less than his competitors, he should bare all the facts as to his alleged different costs *even should they reside in some trade secret or process.* A trade secret or process might prove the real reason for the alleged difference in costs, wherefore every opportunity to develop and test the truth of that fact, and whether or not it was in fact and law a trade secret, should be afforded his competitors, the public, and the Government. That is the full statutory right accorded by this Act. Obviously Congress did not intend that such an applicant should conceal from full intelligent, informed public exposition his true costs of production and the real reason therefor. It was not intended that any applicant *should* obtain the great advantage of this statute by the least concealment. The statute so put him on notice and he invoked it with that notice. That this is the policy of Congress in that Act, see Sec. 501, Tariff Act of 1922, of which this is Sec. 315 (a), wherein importers seeking reduction of their duties are required to submit to cross-examination by their competitors in appraisement cases which ofttimes include *all items of the cost of production of the imported article.*

Soon after the enactment of the flexible tariff (September 21, 1922), and on October 24, 1922, the American Nitrogen Products Company, of Seattle, Washington, filed a petition with the United States Tariff Commission to increase the rate of duty upon sodium nitrite from 3 cents, as provided in said Act, to 4½ cents per pound *at the instance of this applicant.* (R. 160.) July 20, 1923, due notice was published that on September 10th, 1923, at the office of the Commissioner in Washington, "*a hearing*" in said matter would be held "at which all parties interested will be given an opportunity *to be present, to produce evidence, and to be heard with regard to the differences in costs of production and all other facts and conditions enumerated* in Sec.

315 of the Tariff Act of 1922" (R. 69, 72), affecting sodium nitrite.

At said time and place the Norwegian Nitrogen Products Company, *a New York corporation*, sole American selling agents of the Norsk Hydro-Electric Co., of Norway, importers of sodium nitrite, entered and were accorded record appearance as an interested party in opposition to said petition (R. 72) and demanded a complete copy of the petition filed by the American Nitrogen Products Company upon which the "hearing" had been noticed and was proceeding. This was denied, the Chairman of the Commission stating, "The Commission will protect the *confidential* nature of *all* information submitted to it (R. 85)". Previously a *deleted* copy thereof had been furnished petitioner with all alleged "confidential" matter (including *all* costs) stricken (R. 160, 161, 162, 163).

At this hearing, Mr. Graff, president of the applicant company, declined to give his plant capacity (R. 131) or *any* of his costs of production (R. 131). On cross-examination by counsel for this petitioner he refused to state his "costs of labor", "costs of power", or "costs of raw materials", not because "trade secrets" but because, as he stated, "that is competitive information, *it is in the hands of the Commission*" (R. 137-8), and is "*confidential* information."

On cross-examination, Mr. Graff did give his actual plant investment *in the United States* and fixed the amount at $200,000 (R. 138), whereas in his petition he stated, "Our outstanding capital stock, fully paid up, is $1,229,500" and "the above profit", "$28,000 per year", "is therefore merely nominal and would be entirely inadequate for a dividend." He was here seeking a rate that would enable him to pay dividends on a "capital investment of $1,229,500"! It was developed on cross-examination that the remaining capital invested, fair dividends upon which petitioner was asking the Commission to insure him by increas-

ing the duty on imported nitrite, was a closed plant in Canada, the cost of construction of which was included in the aforesaid stated invested capital. (R. 112-113.) The records of Congress show that it was upon the unchallenged representations by the applicant of a plant capital stock of $1,229,500 that the said increase from 1/4 to 3 cents per pound was obtained.

What greater proof of the wisdom of the statutory right provided by the Act of interested parties appearing to cross-examine witnesses could be had than is here demonstrated?

Cross-examination as to further items of cost being denied petitioner, at the continued "hearing" on September 26th, formal demand was made, as follows:

> "* * * I want to make formal requests, as an interested party appearing in this case, that we have reasonable opportunity to inspect and to be heard upon all evidence which has been offered in this case, not deemed by the Commission trade secrets, or not, in fact, trade secrets or processes. That is request No. 1.
>
> "We want to make the further request that the Commission afford us the same rights to inspect, and to offer evidence in disputation thereof, if we see fit, and to be fully heard upon, all the evidence in the possession *of the Commission*, as to the *cost of power* in the United States in the production of nitrite.
>
> "Third, the same request as to the *number of laborers employed*, and *the wages paid* as shown in the American Nitrogen Products testimony *submitted before this Commission.*
>
> "Fourth, the same request as to *all capital invested* in the American Nitrogen Products Company plant in the State of Washington.
>
> "Fifth, referring to the *summary of information* in the matter of sodium nitrite, the subject of a public hearing September 10, 1923, that we have opportunity to cross-examine the experts of this Commission who gathered this testimony, as to the testimony *which they have submitted to the Commission*, and that we have

> the right to offer such testimony as we see fit in opposition thereto, and that we have the right and reasonable opportunity to be heard thereupon."

Said summary was mailed appellant *September 15*, 1923. (R. 163-175.) On *October 6*, 1923, these requests, in so far as they related to inspection of evidence of costs before the Commission and the examination of the agents thereof, were formally in writing denied by the Commission (R. 146, 147, 148, 149) upon the grounds that all such information was "confidential" or "trade secrets".

The rules of the Commission (which in so far as they accord and do not conflict with the statutes have the force of and are law, Haas v. Henkel, 216 U. S. 462), accorded plaintiff *in some particulars* the rights in this case denied. These rules then in force provided: (R. 67)

> Parties who have entered appearances shall, prior to the filing of briefs, have opportunity to examine the *report* of the commissioner or investigator in charge of the investigation *and also the record* except such portions as relate to trade secrets and processes.

Clearly this rule accorded interested parties appearing not only the right to examine the "reports" of "investigators" as well as "commissioners", but also the "record", or facts upon which such as based, precisely what was here demanded and refused.

The rules of the Commission further provided: (R. 67)

> *Final hearing shall be before the Commission.*
> Parties who have previously entered appearances may file briefs and upon permission being granted by the Commission present oral arguments. The findings of the Commission and of the members thereof shall be in writing and shall be transmitted, together with the record, certified by the Secretary under the seal of the Commission, to the President for his action under the law.

Any effective administration of this rule required the *final* summary of the Commission should be submitted interested parties and that they thereupon be heard. The rule itself entitled them to "file briefs" thereupon. Common justice required this right and that these briefs when filed should be forwarded to the President, for *he* alone makes the findings which determine the consequent rate.

The Record (R. 70, 71) discloses that this alleged Summary of Information in the matter of sodium nitrite, made by the Commission's experts to the Commission, was not delivered to petitioner until *September 16*, 1923, with the necessity that petitioner should answer same by *September 26*, 1923. Any effective answer to that summary required the gathering of evidence from Norway beyond the seas and the State of Washington across the continent, as well as extensive study and briefing. It imposed upon petitioner a physical impossibility. Furthermore, the Record shows (R. 77 *et seq.*) when complaint was made before the Commission as to the shortness of this time and further extension requested no further time would be allowed than until *October 6 following*, or *ten days!* Furthermore, this Record shows (R. 67) that while the rules of the Commission provided that "Parties who have entered appearances, shall, *prior to the filing of briefs*, have opportunity to examine the *Report* of the commissioner or investigator in charge of the investigation and also *the Record* except such portions as relate to trade secrets and processes", petitioner was denied access to the record and was given until October 6, 1923, *and no longer* within which to produce evidence and file briefs, without any access to the record or knowledge of what proofs were in the Commission's possession in order to produce evidence in disproof thereof or brief the same. (R. 81) In truth and in fact, as shown by this Record (R. 196) the "Advisory Board's final Summary Report to the Commission" which petitioner was entitled under the rules of the Commission to examine and con-

trovert with both facts and law, was "dated *October 29*, 1923", *twenty-five days after petitioner was excluded from any opportunity to file briefs, or in any manner be heard*, as was its statutory right! Indeed, it was not until October 6th, 1923, that petitioner was finally officially denied its requests to inspect the Commission's data (R. 146-149) and therefore informed that it must rely upon *its own* resources of investigation, an obvious impossibility in the time allowed.

All of which was in gross violation of the rules of the Commission, and in violation of the statutory rights of petitioner.

Moreover, said alleged summary expressly omitted therefrom all domestic cost data or estimates of such, stating in lieu thereof that all such were "trade secrets" within the meaning of said Sec. 708, Revenue Act of 1916! (R. 171, 172.) It was not a summary of *facts* but a few unsound *conclusions of law.*

Thereupon petitioner obtained from the Supreme Court of the District of Columbia a temporary writ of mandamus, commanding the Commission to comply with petitioner's requests.

The Commission answered that *all information before it in these investigations as to plant investment, costs of labor, costs of power, and costs of material was "confidential" and "trade secrets" which it was inhibited by law from disclosing,* under the provisions of said Sec. 708 of the Revenue Act of 1916, which plainly places no legal inhibition upon the *Commission as such* while holding such "hearings", and which "costs" were not "trade secrets". Indeed, there is neither statute nor regulation which denies interested parties appearing the right to inspect and be heard upon *"confidential"* matter.

Petitioner demurred to this answer.

The Supreme Court of the District of Columbia overruled the demurrer.

Petitioner stood upon the pleadings and duly appealed to the Court of Appeals of the District of Columbia. The Court of Appeals of the District of Columbia rendered a decision *fully sustaining upon the merits every contention of petitioner;* but, taking judicial notice that, pending appeal, the Commission had made its report upon the matter to the President recommending, and he had made and proclaimed his findings and the estimated increased rate of duty, held the case moot and upon that ground alone rendered judgment against petitioner (6 Fed. Rep. (2d) 491). This Honorable Court on appeal vacated *the judgment* of the Court of Appeals of the District of Columbia *upon the point alone that the case was moot,* but expressly declined to pass upon or review the case upon its merits. *United States of America ex rel. Norwegian Nitrogen Products Co., Inc., Plaintiff in Error, vs. United States Tariff Commission, Thomas O. Culbertson, et al.,* 274 U. S. 106.

Meanwhile, under authority of Sec. 514 of the Tariff Act of 1922 (42 Stats. 969; U. S. C. Tit. 19, Sec. 398), *supra,* petitioner protested the assessment by the Collector of the increased duty upon all its importations of sodium nitrite, setting forth distinctly and specifically the particulars wherein the Commission had denied petitioner its statutory rights, had failed to follow the law, had denied petitioner a fair or legal hearing, and that the said findings and proclamation of the President were void and the consequent assessment of the resultant increased rate of duty upon sodium nitrite illegal. (R. 8, 9, 10, 11, 12.)

On due hearing of said protest before the United States Customs Court the decision of the Collector overruling said protest was affirmed (R. 37) (T. D. 44824). One Judge dissented (R. 52) on the grounds that the flexible tariff act was unconstitutional.

That Court predicated its decision upon the grounds that the courts did not have the power to review such a presidential finding of facts and proclamation thereof upon *any* grounds.

On appeal to the United States Court of Customs and Patent Appeals, the *judgment* of the United States Customs Court was affirmed, but the *decision* in effect reversed. The appellate court held against all contentions of the Government save that the "hearing" contemplated by the statute (Sec. 315) had been given the interested parties appearing *by affording the mere right to introduce testimony* and without the right being afforded to inspect any of the evidence offered by the other side or data collected by and before the Commission or to examine any of the Commission's agents (R. 200-213) or to cross-examine the applicant before the Commission as to any of its stated costs, whether of labor, materials, power, or otherwise, in order to produce evidence in contradiction thereof or be heard thereupon.

To review that judgment and decision due petition was presented to this Honorable Court and granted.

OPINIONS OF THE COURTS BELOW AND THE STATUTES INVOLVED.

For the opinion of the United States Customs Court, dated April 21, 1931, see T. D. 44824 (R. 37-61).

For the opinion of the United States Court of Customs and Patent Appeals, dated May 2, 1932, see T. D. 45674 (R. 200-213).

For section 315 (a) and (c) flexible tariff provision of the Tariff Act of 1922, see Exhibit "A" hereto annexed.

For the proclamation of the President dated May 6, 1924, see (R. 196-198).

For protest of importer overruled by the United States Customs Court and by the United States Court of Customs and Patent Appeals, see (R. 8-12).

PETITIONER'S LEGAL POSITION STATED.

The legal effect of the aforesaid law and regulations read together is that the President was commanded to make

certain *Findings* and proclaim them; that his statutory assistant in the performance of that commanded duty was the United States Tariff Commission; that in the particular case as in all cases by general regulation the President directed the Tariff Commission to proceed with the commanded investigation *"in accordance with the law"* * * * and *"under rules and regulations prescribed by the Commission,"* and *until the Commission had so done the statute expressly inhibited the President from making and vested in him no power to make findings or proclaim such.*

The law provided that in the course of all such investigations the Commission should give reasonable public notice of its *hearings* and reasonable opportunity to interested parties "to be present," "to produce evidence" "*and* to be heard."

The Rules and Regulations prescribed by the Commission provided that interested parties appearing should have a right "to examine the Report of the Commissioner or investigator in charge of the investigation *and also the Record* except such portions as relate to trade secrets and processes."

It was further provided by the Commission's Regulations that parties who had previously entered appearances might file briefs and upon permission of the Commission present oral arguments.

It was further likewise provided that the findings of the Commission should be in writing and transmitted *"together with the Record,* certified by the Secretary under the seal of the Commission, to the President for his action under the law."

In this case the Record shows that the Commission did not proceed "in accordance with the law" as directed by the President in that protestant was neither afforded a reasonable opportunity "to be present", "to produce evidence", in opposition to the evidence gathered by the Commission, or "to be heard" upon any of the evidences of

costs received by the Commission made the subject of its findings or report or reported to the President. Nor did it, as required by the rules of the Commission, give interested parties appearing an opportunity to examine either the Report of the Commission or investigators in charge of the investigation, or "the Record." *All evidence as to both domestic and foreign costs of production acted upon by the Commission and the President and the findings of the Commission thereupon as transmitted to the President were withheld from petitioner.*

The Record shows that there was an absolute and complete denial of the interested parties appearing and so requesting at any and all times to examine the Record. There was an absolute and complete denial of the interested parties appearing "to be heard," as that term is defined by the law and decisions of the courts.

The Tariff Commission, therefore, not having proceeded "in accordance with the law," or as required by law, or by its and the regulations of the President, there had been no investigation by the Tariff Commission "in accordance with the law," and therefore no "*such* investigation" whatever prior to the President's findings and proclamation.

The legal dereliction and error here complained of is not on the part of the President but the Commission, which, by denying petitioner its plain statutory rights did not make for and place before the President "such" an "investigation" as Congress commanded it should for the President's more accurate and complete information, and such as is made by Congress *an express statutory condition precedent* to any findings or proclamation by the President and the legal jurisdiction or power to so find or proclaim.

That the President was given due and timely notice of and served with protest against the illegality of the proceedings of the Commission, and of the pendency in the jurisdiction of the courts of legal proceedings in remedy and challenging the legality thereof before making his find-

ings and proclamation, is shown by this record. (R. 188-194.)

Wherefore the statutory command of Congress that *no proclamation should be made by the President until "such investigation"*—that is to say, one in accordance with the law and as commanded by Congress, not having been observed, neither valid findings nor proclamation could be or were made by the President, and, in consequence, no valid assessment of duties thereunder by the Collector has been made.

SPECIFICATION OF ERRORS.

Of the several errors assigned by petitioner in the United States Court of Customs and Patent Appeals (R. 1, 2, 3, 4) essentially all thereof, save and except those relating to a denial of the legal rights of petitioner to a "hearing" and "to be present," "to produce evidence," and "to be heard" before the United States Tariff Commission, and that error was had by reason of the very limited time allowed petitioner, September 16 to October 6, to produce evidence in rebuttal of the alleged summary of facts submitted by the United States Tariff Commission were sustained. The United States Court of Customs and Patent Appeals disagreed with the opinion of the lower court, upheld the reasoning and construction contended for by petitioner in all particulars save and except that it held that petitioner had been accorded its said statutory rights as provided by the statute and rules of the President and the Commission in the above-stated particulars.

Error is assigned as follows:

(1) The court below erred in its construction and adjudged scope of the rights of the petitioner under that provision of the flexible tariff, Sec. 315 (c), Tariff Act of 1922, (42 Stats. 941; U. S. C. Tit. 19, Sec. 154), to wit, "The Com-

mission shall give reasonable public notice of its hearings, and shall give reasonable opportunity to parties interested to be present, to produce evidence, and to be heard," in denying and in refusing to adjudge petitioner its due and legal rights thereunder, and, in holding that thereunder petitioner had the right only to be present and introduce such evidence as it might guess pertinent or contradictory or explanatory of that in the record without being shown or knowing in whole or any part the cost data gathered by the Commission or introduced by applicant in and as a part of the record.

(2) The court below erred in refusing to follow the decision of the Court of Appeals of the District of Columbia, (6 Fed. (2d) 491), rendered herein *upon the same record,* not *obiter dictum,* and which this Honorable Court on appeal refused to disturb after declaring the same "upon the merits" of the case 274 U. S. 106.

(3) The court below erred in holding that the Tariff Commission had legally pursued the law and the duly promulgated rules and regulations relative to and controlling its procedure under the provisions of the flexible tariff, that it had made a legal and valid investigation for and report to the President and that the consequent findings and proclamation of the President were in accordance with the law and not void.

(4) That the court below erred in not holding, as was held by the Court of Appeals of the District of Columbia upon the same record, "that petitioner was by the proceedings herein deprived of its legal rights" "to produce evidence" and "to be heard", as provided by the law and due regulations, but on the contrary holding that petitioner was afforded all provided legal rights.

(5) The court below erred in holding that the said findings and proclamation of the President were not illegal and void because at the time of the making thereof the Tariff Commission had not *made* or reported to the President an

investigation in accordance with the law of the subject matter as required by the presidential order and the statute submitting the same to the Commission for such investigation and in holding to the contrary.

(6) The court below erred in not overruling and reversing the decision of the United States Customs Court refusing to sustain the protests of petitioner against the decisions of the collectors of customs herein assessing petitioner's imported nitrite, properly dutiable at 3 cents per pound under paragraph 83 of the Tariff Act of 1922 as originally enacted, at the alleged higher rate imposed by Section 315 of the said Act as estimated and found by the Tariff Commission and proclaimed by the President.

(7) The court below erred in holding that *all* items of cost production as shown by this record to be and admittedly before the Commission for the purpose of its findings and report herein, to wit, costs of materials, costs of labor, wages paid employees, number of employees, costs of power, invested capital and plant investment, were "trade secrets", and further that petitioner had not the right to inspect the same or any part thereof so as, if found desirable, to produce evidence in contradiction of or relative thereto or to be heard thereupon.

(8) The court below erred in holding that either the law or regulations empowered the Tariff Commission to refuse inspection by petitioner, in whole or in part of any cost data deleted from the application to the Commission of applicant herein or being offered in evidence by applicant at its public hearing herein, or admittedly in its possession for the purpose of proceeding herein or a full and complete summary thereof, or the final reports of its investigation or the final findings herein as intended to be and later were reported to the President upon the subject of said investigation, all the foregoing for the purpose of permitting petitioner to produce evidence contrary or relative thereto or to be heard or to file briefs thereupon, upon the grounds

that the same were "confidential" "trade secrets", or for any other reason.

(9) The court below erred in holding that the Tariff Commission gave petitioner a "reasonable opportunity to produce evidence and to be heard upon its very incomplete alleged "summary of information" delivered petitioner September 16, 1923, by granting petitioner on September 26, 1923 (R. 70-81), until October 6, 1923, *ten days* and denying petitioner any further time, under conditions shown by the record, in which to produce evidence necessarily from Norway and the Pacific Coast in contradiction of said alleged "summary of information" and to be heard thereupon, the preparation of which alleged summary required more than a year by investigators of the Commission visiting Norway and the Pacific Coast.

(10) The court below erred in affirming and not reversing the judgment herein of the United States Customs Court and directing a judgment therein overruling and reversing the decision of the Collectors of Customs herein overruling petitioner's protests, and, in not adjudging that the decisions of said Collectors of Customs were null and void for the reasons hereinbefore assigned.

ARGUMENT.

THE COMMISSION, AS SHOWN BY THE RECORD HEREIN, DENIED PETITIONER, AN INTERESTED PARTY APPEARING AND ENTERED OF RECORD, AT THE DULY NOTICED HEARING DURING THIS INVESTIGATION, THE RIGHT "TO BE PRESENT," "TO PRODUCE EVIDENCE" AND "TO BE HEARD," AND DID NOT PROCEED IN ACCORDANCE WITH THE LAW AND REGULATIONS. WHEREFORE NO "SUCH INVESTIGATION" AS THE STATUTE COMMANDS AS CONDITIONS PRECEDENT TO ANY PRESIDENTIAL FINDINGS AND PROCLAMATION HAVING BEEN MADE SUCH FINDINGS AND PROCLAMATION WERE VOID AND THE EXCESS DUTY ACCORDINGLY ASSESSED ILLEGAL.

On this issue the decision of the United States Court of Customs and Patent Appeals here sought to be reviewed is contrary to and in conflict with the decision of the Court of Appeals of the District of Columbia theretofore rendered in the case of The United States ex rel Norwegian Nitrogen Products Company, Inc., v. The United States Tariff Commission, et al., 6 Fed. (2d) 491, *both decisions being a construction of the same paragraph of the same statute in cases duly presented and decided between the same parties upon the same record. The said decision of the Court of Appeals of the District of Columbia on appeal to this Honorable Court was declared a decision "upon the merits" and was not disturbed by this Honorable Court. United States of America ex rel Norwegian Nitrogen Products Company, Inc., Plaintiff in Error, v. United States Tariff Commission, Thomas O. Marvin, et al.,* 274 U. S. 106.

The final decision of this issue involves the question: are all costs of production, costs of labor, costs of materials, costs of power, costs of transportation, costs of plant invest-

ment and equipment, overhead, etc., trade secrets or processes? The Government and the Commission so maintain. This petitioner, the great trade and labor organizations of the country, maintain the contrary. The Court of Appeals of the District of Columbia held to the contrary; the United States Court of Customs and Patent Appeals in this case essentially held the affirmative.

Upon this very important issue as to the legal rights of parties appearing in accordance with a public notice of a "hearing" before the United States Tariff Commission, to wit, the right "to be present, to produce evidence, and to be heard," no better or further argument supporting the contentions of Petitioner herein need be offered than the careful detail résumé of the facts presented by this record and its sound legal conclusions.

Judge Smith, Judges Robb and Van Orsdel concurring, Court of Appeals of the District of Columbia, in *United States of America ex rel. Norwegian Nitrogen Products Co., Inc., Plaintiff in Error, vs. United States Tariff Commission, Thomas O. Marvin, William S. Culbertson, et al.*, 6 Fed. (2d) 491, rendered that decision upon the identical subject matter, record and statute here before the Court which decision, in so far as is here pertinent, is as follows:

> SMITH, Acting Associate Justice. This is an appeal from a judgment of the Supreme Court of the District of Columbia denying relators' petition praying for a writ of mandamus against the United States Tariff Commission.
>
> Sec. 315 (a) of the tariff act of 1922 empowers the President to ascertain by investigation the differences in cost of production between articles, the growth and product of the United States and like or similar articles, the growth and product of competing foreign countries. If that investigation develops that the duties fixed by the act do not equalize such differences the President is authorized to determine and proclaim the changes in classification or the increases or decreases in the rates of duty provided by the act neces-

sary to equalize foreign and domestic costs of production. Changes in classification and increased or decreased duties so proclaimed by the President take effect under the act within 30 days after the date of their announcement by the President.

Subdivision (c) of section 315 expressly provides that *no proclamation shall be issued by the President* changing the classification or increasing or decreasing duties until after an investigation of the differences in cost of production has been made by the United States Tariff Commission. That subdivision makes it the duty of the Commission to give public notice of its hearings and to afford to parties interested a *reasonable opportunity* to be present, *to produce evidence and be heard.* The rules, which the Commission is authorized to adopt, prescribe that parties who enter an appearance in the investigations provided for by section 315 shall have the opportunity to examine *the report* of the Commissioner or investigator in charge of the investigation *and* also *the record,* with the exception of such portions of the report or record as relate to trade secrets or processes which section 708 of the act of 1916 forbids the Commission to divulge.

On the 24th of October, 1922, the American Nitrogen Products Company, a Corporation, organized under the laws of the State of Washington, filed with the United States Tariff Commission, a petition and brief praying that the duty of three cents a pound imposed on sodium nitrite by the tariff act of 1922 be increased to 4½ cents per pound. On the 20th of July, 1923, notice was given by the Commission that a public hearing would be held at its office at 10 o'clock a.m., on the 10th of September, 1923, concerning the subject-matter of the petition and that at that time and place the parties interested would be given an opportunity to *be present,* to *produce evidence* and to *be heard* as to differences in cost of production and as to all other facts and conditions pertinent to the matters which were then to be the subject of investigation.

On the 10th of September, 1923, the Norwegian Nitrogen Products Co., appeared before the Commission *and made a formal request that it be given a copy of the petition which initiated the investigation and which*

was filed by the American Nitrogen Products Company. To that request the American Nitrogen Products Company objected on the ground that *all information* given to the Commission *as to* its *capital assets* and *costs of production* was *confidential* and *was furnished on the promise that it would be so treated by the Commission.* The Chairman announced that "the Commission has considered that when anyone submits information to it which it declared to be *confidential* it shall observe the *confidential relation.*"

On the 11th of September, 1923, the Norwegian Nitrogen Products Company *in writing* formally requested that it be supplied by the Commission with *all facts* submitted to the Commission and also with a *complete* copy of the petition in order that the Company might *be heard* on the matters set forth therein. In the written request was included a brief in which it was stated that the Norwegian Nitrogen Products Company was entirely in the dark as to the real case and actual facts presented to the Commission by the American Nitrogen Products Company and that therefore the opposition to the petition was not in a position to meet the case or the facts so presented. The brief also urged that until the opposition had information as to all matters and every particle of evidence *not trade secrets* submitted to the Commission, no valid finding by the Commission could be had. The Commission ruled that it had obtained its cost data under *pledges of confidence* and that it could not violate those pledges of its own motion. The Commission therefore declined to accede to the request of the opposition.

The Commission furnished to the appellant the application of the American Nitrogen Products Company for an increase of duty, from which application however *was deleted all data* as to *costs of production* AND *all matter deemed to be confidential by the Commission.* Appellant was also favored with a *so-called summary* of information in which it was stated that the domestic price of soda ash, an important material in the manufacture of sodium nitrite, was on September 10, 1925, $1.45 per 100 pounds in bags at makers' works; that the normal consumption of sodium nitrite in the United States was about 6,000,000 pounds per

year, and that domestic producers had plant capacities equal to about 87 per cent of that requirement; that from 1¾ to 3½ million pounds of sodium nitrite were imported annually during the period 1914 to 1921 excepting the year 1920, in which year 11,690,000 pounds came into the country from abroad; that 50 per cent of the demand for sodium nitrite in the United States was supplied by imports; that during the 4th quarter of 1922, 1,460,528 pounds of sodium nitrite were imported at an average declared value of 4 cents per pound; that during the first 6 months of 1923, 3,647,125 pounds of nitrite were imported at an average declared value of 4.4 cents per pound; that the exports of sodium nitrite from Norway to the United States during March, April, and May, 1923, were 1,070,000 pounds; that the average invoice value was 4.84 cents per pound c. i. f. New York, from which was deducted packing, inland freight, ocean freight and insurance, leaving *an average price at the factory in Norway 4.34 cents per pound. An estimate of the cost of producing sodium nitrite in Norway* was also supplied. *With the exception of freight rates on soda ash and the domestic price thereof no information whatever was apparently given to the appellant as to the domestic cost of producing sodium nitrites.* After receiving the summary of information the opposition *again demanded 1st, a reasonable opportunity to inspect and to be heard upon all evidence which had been offered in the case, not deemed by the Commission to be trade secrets, and not, in fact, trade secrets or processes; 2nd, an inspection of all the evidence* in the possession *of the Commission* as to the *cost of power* used in the United States for the production of nitrite; 3rd, information as to the evidence submitted *to the Commission* concerning the *number of laborers employed by the American Nitrogen Products Company and the wages which they received;* 4th, inspection of the evidence submitted *to the Commission* as to the *capital invested* by the American Nitrogen Products Company; 5th, an opportunity to *cross-examine the experts* of the Commission *as to the evidence submitted by them to the Commission.*

The Commission ruled that it would permit the opposition to be heard and to introduce any evidence that

it might have, but that it *would not supply any information whatever in addition to* that furnished by its summary of information. Inspection by the opposition of any original or primary data collected by the Commission and cross-examination of the Commission's investigators as to any of the information secured by them was also refused. *The capital invested by the American Nitrogen Products Company, the value of its plant, the number of laborers employed by the Company, the wages paid and all details as to the cost of production of nitrites was held by the Commission to be confidential information, to which the opposition was not entitled.*

While the investigation of the differences of costs of production of sodium nitrite in the United States and in competing countries *was still pending before the U. S. Tariff Commission* and before its report as to the results of the investigation had been transmitted to the President, the relator on the 12th of September, 1923, filed in the Supreme Court of the District its petition for a writ of mandamus which recited in substance the facts hereinbefore stated and prayed 1st, that a rule or order be granted directing the Tariff Commission and its members to appear and show cause why a writ of mandamus should not issue requiring them to permit the relator to examine the petition of the American Nitrogen Products Company and all data or information or evidentiary matter on file with the Commission respecting the cost of producing sodium nitrite at the plant of said American Nitrogen Products Co. whether in the United States or out of it; 2nd, that the Tariff Commission and its members show cause why a public hearing should not be allowed at which the relator and any person or corporation appearing before the Commission, having an interest in the subject-matter, should have the right and opportunity (a) to cross-examine the investigators, experts, agents and witnesses who may have supplied data, information or evidentiary matter to the Commission; (b) to offer evidence in contravention of such data, information and evidentiary matter; (c) to present arguments and representations against said petition and against the probative and legal value of any and all data, information

and evidentiary matter on file with the Commission upon which the American Nitrogen Products Company based its application for an increase of duty on sodium nitrite.

The Supreme Court issued an order to show cause in accordance with the prayer of the petition and in response to the order the Tariff Commission filed its answer in which the demands made by the relator and the rulings thereon as hereinbefore set out were substantially admitted. To the answer a demurrer was filed which was overruled by the court and the relator electing to stand upon its demurrer the court on the 28th of April, 1924, ordered, adjudged and decreed that the prayer of the petition be denied and the petition dismissed. From that judgment this appeal was taken.

After the denial of the petition for mandamus and the dismissal of the petition, the Tariff Commission submitted to the President a report of its investigation of the cost of production of sodium nitrite in the United States and the production, cost thereof in Norway, the principal competing country. Subsequent to that report and on May 6, 1924, the President issued a proclamation in which was recited the investigation made by the Tariff Commission and the President's *finding* that the costs of production in the United States and Norway, the principal competing country, were not equalized by the duties imposed by Congress on sodium nitrite.

The proclamation also declared that it was necessary to increase the duty on sodium nitrite from three cents to 4½ cents per pound in order to equalize costs of production and accordingly advanced the duty on sodium nitrite from 3 cents to 4½ cents per pound.

The Tariff Commission contended in the lower court and contends here that Section 315 of the Act of 1922 requiring the Commission to give reasonable public notice of its hearings and a reasonable opportunity to interested parties to be present and produce evidence and to be heard, grants to the interested parties nothing more than the right to present to the Commission such evidence as they may have and to argue their case. We cannot agree with that contention.

Under the act of 1916 the Tariff Commission was a mere investigative body charged with the duty of gathering tariff information and submitting the same whenever required to the President, the Committee on Ways and Means of the House and the Committee on Finance of the Senate. Unquestionably under that act the Tariff Commission might hear or not hear interested parties and whether it heard or refused to hear them no harm could come to any one inasmuch as no change of duty could be accomplished without the intervention of Congress. Congress was not bound by anything that the Commission might do, say, recommend or find and was entirely free to practice investigations on its own account and to reach a conclusion as to the facts and the inferences to be drawn therefrom utterly at variance with that reported by the Commission.

Section 315 of the Tariff Act of 1922 however sought to make the dutiable list more flexible by giving to the President in certain contingencies and after investigations made by the Tariff Commission the power to change the rates of duty fixed by Congress. Under that Section the rates of duty prescribed by statute may be increased or decreased 50 per cent by the President. That is a very large grant of power if grant it be and for its exercise nothing is required except an investigation and report by the Tariff Commission.

For the correctness of his decision the President must rely on the Commission's fairness, its knowledge of the facts as they are and the verity of its findings and report. For the accuracy of its report and the wisdom of its recommendations, the Commission in its turn depends on ex parte testimony taken by it and on the unverified reports of its investigators in the field after such testimony and reports have been subjected to the test of the *hearing which the statute and the Commission's rules prescribed.*

For the purposes of Section 315 the Commission is no longer left free to hear whom it pleases or what it pleases. It is required by law to give reasonable public notice of the hearing prescribed by the section and to give reasonable opportunity to parties interested to be present, to produce evidence and to be heard. That

notice and the right of interested parties to be present, to produce evidence and to be heard, was not designed as the Commission contends to aid the Commission in getting the economic facts. The Commission needed no such help inasmuch as the act of 1916 as originally passed furnished to that body adequate and effective means to secure all data, evidence, facts information and apparently even trade secrets and processes pertinent to its inquiries. (See Section 706 and 708 of the Act of September 8, 1916 (39 Stat. 797-798.)

The right of interested parties to be present, to produce evidence and to be heard at the hearings contemplated by section 315, *was granted by Congress and not by the Commission. That right was conceded to adverse interests to protect them against the abuses of ex parte hearings and proceedings and against ex parte statements and evidence which if made known to those opposing a change in rate, might be discredited, controverted or refuted.*

The Commission in the exercise of the authority conferred upon it by the act of 1916, through its investigators gathered data as to *capital investment, cost of power, wages paid to labor and the cost of production of nitrites in the United States and abroad.* Its refusal to disclose any of that information with the exception of the price of soda ash reduced to little better than an empty form the right of the opposition to be present to produce its evidence *and to be heard.*

Of what value to the opposition was the right to produce evidence if the opposition knew nothing of the data collected by the Commission or of the facts or evidence submitted to the Commission for its consideration in reaching a conclusion as to the cost of production of nitrites? Just how was the opposition to meet the petition of the American Nitrogen Products Company if the former was not permitted to see the petition of the latter and was supplied with nothing better than a deleted copy from which was omitted every material allegation as to the costs of production set out in the petition actually filed with the Commission? Of what use to the opposition was the right to introduce evidence on its part and to argue the case if it had no knowledge of the data gathered by the

Commission or of the information submitted by the American Nitrogen Products Company or of the issue raised by the petition and the evidence.

To hold that the right to be heard means simply the right to produce evidence and to argue the case would leave interested parties at the mercy of those who initiated the proceeding and render useless the safeguard which Congress manifestly interposed to protect importers, merchants, industrials, consumers and even the Commission itself from unreliable data, insufficient evidence and mistaken conclusions of fact.

Barring trade secrets and processes the disclosure of which is expressly forbidden, *the opposition by virtue of its statutory right to be heard, was entitled to be informed of the facts and evidence privately presented to the Commission* for its consideration. St. Louis, Southwestern R. R. Co. v. I. C. C., 264 U. S. 64, 78. Indeed, *under the rules of the Commission* itself, the Norwegian Nitrogen Products Company should have been given an opportunity *to examine the record and the reports* of the Commission or investigator in charge of the investigation.

The term "trade secrets" as ordinarily understood, means an unpatented secret commercially valuable plan, appliance, formula or process which is used for the making, preparing, compounding, treating or processing of articles or materials which are trade commodities. In re Bolster, 59 Wash. 655; National Tube Co. v. Eastern Tube Co., 3 Ohio (C. R.) 459, 462, 464.

There is nothing in the record showing and the appellee does not claim that the making known of any of the costs of production involved the disclosure of any unpatented, secret commercially valuable plan, appliance, formula or process used for the making, preparing, compounding, treating or processing of articles or materials. For the purposes of this case therefore, the costs of production demanded by the opposition cannot be regarded as trade secrets.

Costs of production of and by themselves are simply matters of business privacy, the disclosure of which is not forbidden by section 708 of the act of 1916.

Business privacy will be protected, it is true, from more fishing expeditions in search of evidence (Fed-

eral Trade Commission v. American Tobacco Co., 264 U. S. 298, 305-306) and from the prying scrutiny of those who have no higher motive than curiosity, illicit gain or malice. The disclosure of matters of busness privacy may be compelled however if such matters be material and relevant evidence for the protection of the public or for the determination of the rights of interested parties by a legally constituted tribunal or body authorized to procure and consider such evidence. Bank of Columbus v. Okely, 4 Wheat. 235-244; United States v. Louis. & Nash. R. R., 236 U. S. 318.

As the Commission denied to the appellant access to facts, data, information and reports which it had received for consideration as to the cost of producing nitrites in the United States *on the sole ground that* such facts, data, information, evidence and reports *were confidential* and as it does not appear from the record or the finding of the Commission that the examination thereof involved the disclosure of any unpatented, secret, commercially valuable plan, appliance, formula or process used for the making, preparing, compounding, treating or processing of nitrites, *we are of the opinion that the appellant was deprived of the right to be heard as contemplated by the statute.*

Notwithstanding the fact, however, that the appellant was not given the hearing prescribed by section 315, we are convinced that the granting of the writ prayed for would afford to the appellant no substantial relief. The purpose of the investigation made by the Commission in this case was to furnish to the President information which would enable him to determine differences in costs of production, and to fix within the limits prescribed by statute a rate of duty which would equalize such differences. The Commission has made its investigation and reported the results thereof to the President. The President has already acted on that report found the differences in costs of production and made his decision as to the rate of duty which would equalize such differences.

Mandamus to the Commission requiring it to make the disclosure demanded in order that the appellant might be properly heard, would not in any way modify, affect or violate the rate of duty fixed by the President

or compel him to fix a new rate or to restore the rate prescribed by the act of 1922.

* * * * * * * * *

If the Commission had made its report to the President in violation of a valid restraining order or writ of injunction, the appellant would not have been left without a remedy and the court would be diligent in its endeavors to correct as far as the law permitted, the wrong resulting from a contemptuous disregard of its orders. The cases cited by the appellant fully sustain that doctrine, but as no restraining order of any kind was in force at the time the report of the Commission was made to the President, the citations upon which the appellant relies are inapplicable to this case.

The judgment appealed from is affirmed with costs. (Italics ours.)

That said decision was "*upon the merits*" was declared by this Court. *United States of America ex rel. Norwegian Nitrogen Products Co., Inc., Plaintiff, v. The United States Tariff Commission, et al.*, 274 U. S., 106. Said decision was not *obiter dictum.*

The precise point has been decided by this Court repeatedly. It will suffice to quote from *Railroad Companies v. Schutte*, 103 U. S. 118, wherein the identical point was passed upon by that court, stating:

"As to the first question, we deem it sufficient to say that the Supreme Court of Florida has distinctly decided that in the case of this company, as well as the other, the statutory authority was complete. *The point was directly made by the pleadings and as directly passed on by the court.* Although the bill in the case was finally dismissed because it was not proved that any of the State bonds had been sold, *the decision was in no just sense dictum. It cannot be said that a case is not authority on one point because, although that point was properly presented and decided in the regular course of the consideration of the cause, something else was found in the end which disposed of the whole matter.* Here the precise question was properly pre-

sented, fully argued, and elaborately considered in the opinion."

See also *Meyers v. United States,* 272 U. S. 220; *Union Pacific Co. v. Mason City Co.,* 199 U. S. 166; *United States v. Title Insurance Co.,* 265 U. S. 472, 486.

That is the exact status of this decision.

Thereafter, in 1930, Congress in re-enacting the flexible tariff with many changes expressly re-enacted the provision thereof construed by the court in said case essentially in *haec verba,* thereby legislatively approving the construction thereof by said Court.

In justification of the course of petitioner in not applying for an injunction restraining the United States Tariff Commission from transmitting said report to the President pending appellate proceedings upon its petition for a Writ of Mandamus, this Record discloses (R. 194) that the Chairman of the United States Tariff Commission had assured counsel for petitioner that said report would not be made to the Chief Executive pending said proceedings.

Moreover, the Commission (R. 188-192) having been notified in writing, supported by citation of decisions of this Court that such ousting of jurisdiction of the Courts would be contempt of court, a legal truth impliedly acquiesced in by this Court in said quoted decision, petitioner had the legal and ethical right to assume that sworn public officials would not so violate the jurisdiction of the courts.

The decision of the United States Court of Customs and Patent Appeals here sought to be reviewed gives to the words "to be present, produce evidence *and* to be heard" the right "to be present" and "to produce evidence" *only,* thereby reading out of the Act any different office, force or effect of the words "to produce evidence" *and* "to be heard." It likewise denies the word "hearing" as used in the Act its well-settled legal scope. So viewing the law, that Court held petitioner legally entitled to a hearing but

that on this record as hereinbefore analyzed petitioner had been afforded such rights as are accorded by the statute by being accorded only the right to be present and produce such evidence it desired to offer without knowledge or reference to that in the record or what thereof the Commission intended as a basis for its report, findings or recommendations to the President. (R. 205-208.)

The Court's view gives no effect to the words "*and* to be heard", for, if the sole right accorded is to offer one's own evidence without regard to that elsewhere in the record, that right is fully accorded by the words "to produce evidence" leaving the remaining words "*and* to be heard" without office. Indeed, the right "to produce evidence" cannot be legally or in its literal fullness exercised until there is known what and all proofs or evidence are in the record necessary of refutation by producing contrary proofs and evidence. Without that knowledge the right "to produce evidence" in any case cannot in its fullness or fairly be exercised.

That one cannot be "heard" in a case, or that there can be a legal "hearing" upon a subject matter, without examination or knowledge of all the evidence in the record, is so well settled that it seems almost trite of statement or citation. It is uniformly so held. *Interstate Commerce Commission v. Louisville & Nashville R. Co.*, 227 U. S., 88-93, and numerous cases cited. *Monroe Gas & Fuel Co. v. Michigan P. U. Co.*, 292 Fed. Rep., 139-148; *St. Louis Railway Co. v. Interstate Commerce Commission*, 264 U. S., 64; *Atchison, Topeka & Santa Fe R. R. Co. v. United States, &c.* (decided January 4, 1932), 284 U. S., 248.

That the denial of a right "to be heard" prescribed by the statute renders all findings and orders thereupon predicated *void* has long since been settled by plenary authority in addition to the aforesaid decision of the Court of Appeals of the District of Columbia.

It has been uniformly held by this Court that the denial of the right to be heard before a tribunal such as the Inter-

state Commerce Commission, constitutes a justiciable question and failure thereof renders all subsequent orders void.

Precisely analogous acts providing penalties for disclosing certain evidence and "hearings" have been construed by this Court.

Section 20, Interstate Commerce Acts of 1906, 34 Stat. 594, 4 Fed. Stat. An. 505, reads:

> (Sec. 20 continued. (*n*) *Examiner divulging facts, etc.—penalty.*) Any examiner who divulges any fact or information which may come to (sic) his knowledge during the course of such examination, except in so far as he may be directed by the Commission or by a court or judge thereof, shall be subject, upon any conviction in any court of the United States of competent jurisdiction, to a fine of not more than five thousand dollars, or imprisonment for a term not exceeding two years, or both.

Like this act, which provides certain investigations by the Tariff Commission of its own motion as well as by direction of the President, that Act by Sections 12 and 13, 36 Stat. L. 551, 4 Fed. Stat. An. 448-454, provided for investigations by the Interstate Commerce Commission of its own motion *and* upon complaint of interested parties.

Sec. 708 and Sec. 315 here in issue, when read together, as parts of the same code of official duty, in legal effect provide exactly the same as said Section 20 of the Interstate Commerce Act. Sec. 708, enacted in 1916, provided penalties for any "member" of the United States Tariff Commission, "employee, agent or clerk" thereof "to make known in any manner whatever *not provided by law* * * * *the trade secrets* or processes of any person," &c. Section 315 (c), enacted in 1922, directing the *Commission as such* to hold *"hearings"* in certain cases, is a subsequently enacted "manner provided by law", in the language of Sec. 708, authorizing the Tariff Commission to so make

public, exactly as Sec. 20 of the Interstate Commerce Act authorizes that Commission to so make public *all* matters developed at its "hearings." *In other words, the legal conspectus in both cases excepts from the penalties the divulging of any information whatever its character at a "hearing" held by either commission as such.*

Section 15 of that Act as amended June 18, 1910, 36 Stat. L. 552, 4 Fed. Stat. An. 468, provided for "hearings," "full hearings," and "any hearing," reading as follows:

> (Sec. 15 continued. (*b*) *New rates, classifications, etc.—final determination—extension of suspension—hearing of rates increased since January 1, 1910.*) Whenever there shall be filed with the Commission any schedule stating a new individual or joint rate, fare or charge, or any new individual or joint classification, or any new individual or joint regulation or practice affecting any rate, fare, or charge, the commission shall have, and it is hereby given, authority, either *upon complaint* or *upon its own initiative without complaint,* at once, and if it so orders, without answer or other formal pleading by the interested carrier or carriers, *but upon reasonable notice,* to enter upon a *hearing* concerning the propriety of such rate, fare, charge, classification, regulation, or practice; and pending such hearing and the decision thereon the Commission upon filing with such schedule and delivering it to the carrier or carriers affected thereby a statement in writing of its reasons for such suspension may suspend the operation of such schedule and defer the use of such rate, fare, charge, classification, regulation, or practice, but not for a longer period than one hundred and twenty days beyond the time when such rate, fare, charge, classification, regulation, or practice would otherwise go into effect; and after *full hearing,* whether completed before or after the rate, fare, charge, classification, regulation, or practice goes into effect, the commission may make such order in reference to such rate, fare, charge, classification, regulation, or practice as would be proper in a proceeding initiated after the rate, fare, charge, classification, regulation, or practice had become effective. *Provided,* That if

> *any such hearings* can not be concluded within the period of suspension, as above stated, the Interstate Commerce Commission may, in its discretion, extend the time of suspension for a further period not exceeding six months. At *any hearing* involving a rate increased after January first, nineteen hundred and ten, or of a rate sought to be increased after the passage of this Act, the burden of proof to show that the increased rate or proposed increased rate is just and reasonable shall be upon the common carrier, and the commission shall give to the *hearing* and decision of such questions preference over all other questions pending before it and decide the same as speedily as possible. (24 Stat. L. 384, as amended by 34 Stat. L. 589, 36 Stat. 552.)

This Court in *Interstate Commerce Commission vs. Louisville & Nashville R. Co.*, 227 U. S. 88 at page 93, interpreted the meaning of the word "hearing" as used in such and similar acts, numerous citations therein in support of the text of said decision being cited, stated:

> "The Government further insists that the Commerce Act (38 Stat. 743) requires the Commission to obtain information necessary to enable it to perform the duties and carry out the objects for which it was created, and having been given legislative power to make rates it can act, as could Congress, on such information, and therefore *its findings must be presumed to have been supported by such information,* even though not formally proved at the hearing. But *such a construction would nullify the right to a hearing,* for manifestly *there is no hearing when the party does not know what evidence is offered or considered and is not given an opportunity to test, explain, or refute.* The information gathered under the provisions of Sec. 12 may be used as basis for instituting prosecutions for violations of the law, and for many other purposes, *but is not available, as such, in cases where the party is entitled to a hearing.* The Commission is an administrative body, and even where it acts in a quasi-judicial capacity, is not limited by the strict rules, as

to the admissibility of evidence, which prevail in suits between private parties. *Int. Com. Comm. v. Baird,* 194 U. S. 25. But the more liberal the practice in admitting testimony, the more imperative the obligation to preserve the essential rules of evidence by which rights are asserted or defended. *In such cases the Commissioners can not act upon their own information as could jurors in primitive days. All parties must be fully apprised of the evidence submitted or to be considered, and must be given opportunity to cross-examine witnesses, to inspect documents, and to offer evidence in explanation or rebuttal.* In no other way can a party maintain its rights or make its defense. In no other way can it test the sufficiency of the facts to support the finding; for otherwise, even though it appeared that the order was without evidence, the manifest deficiency could always be explained on the theory that the Commission had before it extraneous, unknown but presumptively sufficient information to support the finding. *United States v. Baltimore & Ohio S. W. R. R.,* 226 U. S. 14."

It will be particularly noted that this Court in that case at page 91, held, that where a "hearing" is so provided and is not so held as to *all the data* upon which decision is based *the order of the tribunal made without such hearing is null and void.* The Court said:

"In the comparatively few cases in which such questions have arisen it has been distinctly recognized that administrative orders, quasi-judicial in character, *are void if a hearing was denied; if that granted was inadequate or manifestly unfair;* if the finding was contrary to the 'indisputable character of the evidence.' Tang Tun v. Edsell, 223 U. S. 673, 681; Chin Yoh v. United States, 208 U. S. 8, 13; Low Wah Suey v. Backus, 225 U. S. 460, 468; Zakonaite vs. Wolf, 226 U. S. 272; or if the facts found do not, as a matter of law, support the order made; United States v. B. & O. S. W. R. R., 226 U. S. 14; Cf. Atlantic C. L. v. North Carolina Corp. Com., 206 U. S. 1, 20; Wisconsin, M. & P. R. Co. v. Jacobson, 179 U. S. 287, 301; Oregon Rail-

road v. Fairchild, 224 U. S. 510; I. C. C. v. Illinois Central, 215 U. S. 452, 470; Southern Pacific Co. v. Interstate Com. Comm., 219 U. S. 433; Muser v. Magone, 155 U. S. 240, 247."

Mitchell Coal Co. v. Pennsylvania R. R. Co., 230 U. S. 282;
Louisville & Nashville R. R. Co. v. Bosworth, 209 Fed. Rep. 380-445;
Atchison, Topeka & Santa Fe R. R. Co. v. Spiller, 246 Fed. Rep. 18;
Abilene & S. R. R. Co. et al. v. U. S., 288 Fed. Rep. 102-110.

It is further held in said case at page 93 that any order of the Commission based upon testimony or evidence or data collected by its agents or the Commission and *not subjected to the examination by interested parties appearing is void.*

A very late decision by the United States Circuit Court of Appeals, *Monroe Gas Light & Fuel Co. vs. Michigan P. U. Comm.,* 292 Fed. Rep. 139-148, granting an injunction against enforcement of a gas rate prescribed by the Michigan Public Utilities Commission affirms this doctrine, stating:

"The only evidence before the Commission was the report of its own engineers, who, both as to reproduction cost and original cost, made this estimate of about 14 per cent. The only additional evidence before the court is that of the Utility's engineers, who testify that the proper allowance is about 20 per cent. *If, perchance, the Commission had in mind evidence or papers in other cases, or general documents in its files which showed that 14 per cent was too high, it had no right to base its findings on such documents or evidence without calling them to the attention of the Utility and giving it a chance to be heard.* U. S. v. B. & O. S. W. Ry., 226 U. S. 14, 33, Sup. Ct. 5, 57 L. Ed. 104; Interstate Commerce Commission v. Louisville & N. R. Co., 227 U. S. 88, 91, 93, 33 Sup. Ct. 185, 57 L. Ed. 431; U. S. v. L. & N. Ry., 235 U. S. 314, 321, 35 Sup. Ct., 59 L. Ed. 245."

The same doctrine was announced by this Court in the very late case decided February 18, 1924, of *St. Louis Railway Co. vs. Interstate Commerce Commission*, 264 U. S. 64. Therein was under consideration "the valuation" provisions of the Interstate Commerce Act of 1913, 37 Stat. L. 703, reading:

> "If notice of protest is filed the Commission shall fix a time for *hearing* the same, and shall proceed as promptly as may be to hear and consider any matter relative and material thereto which may be presented in support of any such protest as filed as aforesaid. If after *hearing* any protest of such tentative valuation under the provisions of this Act the Commission shall be of the opinion that its valuation should not become final, it shall make such changes as may be necessary, and shall issue an order making such corrected tentative valuation final as of the date hereof."

This Court in that case after reciting the technical grounds relating to the pleadings upon which affirmance of the dismissal of the petition was grounded, lest that order might be construed a decision against the legal construction claimed for the word "hearing" in that act, proceeded to affirmatively construe that word and define what thereunder "we think that the relator reasonably may demand." This court then proceeded to define the legal rights of relator by virtue of a "hearing" if properly demanded under the aforesaid statute in the following language:

> "But on the other hand, since it must grant a *hearing*, manifest justice requires that the railroads should know the facts that the Commission supposes to be established, and we presume that it would desire the *grounds* of its tentative valuation to be subjected to searching tests. * * * we think that, in such ways as may be found practicable, the relator should be enabled to examine and meet *the preliminary data* upon which the conclusions are found and to that end should be given further information *in evidence of the hearing*

sufficient to enable it to point out errors, if any there be." (Italics ours.)

It will be noted that while the petition for the writ of mandamus in that case was denied it was because of the extraordinary scope of the petition. No particular or definite items or classes of data were demanded. It sought an examination of *all* the data collected by the Commission in that *and other cases*, upon the subject in which relator was interested, before any hearing was being held and, as expressly indicated by the court "before they were offered in evidence before the Commission in any hearing."

In this case the information desired was specifically alleged as to *kind, class* and subject matter by the petition, was specifically so requested of the Commission *at the hearing* and again in writing and so denied in writing. (R. 78-79-185-186.) In the cited case, however, it will be particularly noted that the Supreme Court took precise care not to repudiate but did reaffirm the rule of law previously announced by that court in *Int. Com. Comm. v. L. & N. R. R. Co.*, 227 U. S. 88. In other words, while the petition was, for reasons relating to the form thereof in that case, denied, the court expressly and specifically laid down the precise legal amplitude of the word "hearing" exactly as contended for by appellants *in this case* and *advised* the Commission in that case to proceed exactly as that court *ordered* in the last cited case.

In this case *specific questions* were asked Mr. Graff as to items of costs of labor, material, power, etc., to all of which objection was sustained by the Commission upon the ground that such were "confidential" or "trade secrets."

The functions delegated by the Interstate Commerce Act and the Flexible Tariff are essentially alike, with quasi-judicial powers added. The sole difference is that the former are all entirely performed by a Commission and the latter by a Commission conjointly with the President. The Flex-

ible Tariff Act is in legal effect the same as if the whole investigation was to be made by the President *after "hearings", for he cannot act until such are had by the Commission only, for and on his behalf as a part of his expressly delegated authority.* He cannot legally act or proclaim or order a change in a rate of duty until *the Commission* has *legally* investigated the same. The Commission cannot legally so investigate until it has acted as prescribed by Congress, to wit, after the statutorily prescribed notice and *hearings.* Without such all that follows is *void.*

For a very late decision of this Court (January 4, 1932) to the same effect, see *Atchison, Topeka & Santa Fe R. R. Co. v. United States,* 284 U. S., 248, opinion by Mr. Justice (now Chief Justice) Hughes, it is held:

> "The legal standards governing the action of the Commission in determining the reasonableness of rates are unaltered. In the discharge of its duty, *a fair hearing* is a fundamental requirement. *Interstate Commerce Commission v. Louisville & Nashville Railroad Company,* 227 U. S., 88, 91. In the instant proceeding, the hearing accorded related to conditions which had been radically changed, and a hearing, suitably requested, which would have permitted the presentation of evidence relating to existing conditions, was denied. *We think that this action was not within the permitted range of the Commission's discretion, but was a denial of right.* The *order of the Commission* which was thus made effective and the ensuing supplemental order, *can not be sustained."*

That this Act and the like provisions of the Interstate Commerce Act are comparable for purposes of judicial interpretation is supported by *J. W. Hampton, Jr. & Co. v. The United States,* 276 U. S., 394, wherein this Court sustained the constitutionality of this Act in part citing in support thereof similar delegation of powers and like statutory provisions in the Interstate Commerce Act and decisions thereupon.

The class of decisions typified by *Londoner v. Denver,* 210 U. S., 373, 386, wherein hearings accorded a property owner upon assessment of his property are plainly distinguished in and by a class of cases such as *Hager v. Reclamation District No. 108,* 111 U. S. 701.

In that case this Court pointed out in detail what would be the different requirements in different tax proceedings in order to satisfy the constitutional *or statutory requirement* of due process of law as to accorded hearings and rights to be heard. After commenting upon the fact that in certain cases such as poll taxes, license taxes, and specific taxes upon things or persons or occupations that no notice can be given to the taxpayer or that notice would be of no possible advantage to him, the court proceeded to state at page 709:

> 'Yet there can be no question, that the proceeding is due process of law, *as there is no inquiry into the weight of evidence, or other element of a judicial nature,* and nothing could be changed by hearing the taxpayer. No right of his is, therefore, invaded."

And, at page 710, the court continues:

> "But where a tax is levied upon property not specifically, but according to its value, *to be ascertained* by assessors appointed for that purpose *upon such evidence as they may obtain, a different principle comes in."*

In the Kentucky Railroad Tax Cases, 115 U. S. 321, at page 333, this Court comments upon the fact that the required return of the railroad companies to be filed with the Commission on certain dates is legal proof required by the companies and constitutes a public record open to inspection to all. Further commenting upon the nature of its meetings, which are similar to those at all boards of equalization, the court stated:

> "These meetings are public, and not secret. The time and place for holding them are fixed by law. *The proceedings of the board are required to be made matters of record* and authenticated by the signature of the quorum present. Any one interested has the *right to be present.* In reference to this point, the Court of Appeals of Kentucky, in its decision in these cases, says * * * 'As we construe this act, although in the nature of an original assessment, the parties had the *right to be heard,* and were in fact heard before the board passing on the question of valuation."

A careful review of the cases often cited in this proceeding, to wit, Pittsburgh and C. Railway Co. v. Backus, 154 U. S. 421, 426; Home Telephone Co. v. Los Angeles, 211 U. S., 265, 278; Londoner v. Denver, 210 U. S., 373, 386, will disclose that they are subject to the same considerations.

Adopting, therefore, the doctrine of this Court in the Hagar Case that the rights of interested parties in tax proceedings to be present and to be heard accorded by the statute under its due process of law provisions, *or in the absence of such by statute,* "is meant one which, *following the forms of law,* is appropriate to the case, and just to the parties to be affected," and which "must be adapted to the end to be attained," a review of the cases discloses that those cases holding *the right confined to argument and new proof* are where under the law opprotunity was afforded interested parties to inspect all evidence and data before the tax tribunal and upon which it was proceeding to decision of judgment.

For example: It will uniformly be found true that where a proceeding was one to fix a tax rate upon a corporation, the corporation was on a day certain required to file with the Commission a statement of its properties, the extent thereof, etc., etc., upon which was to be based the rate of charges or the tax to be fixed by the Commission. So in

state and county tax proceedings, the boards of equalization uniformly have before them, sent up by the assessors below, a complete statement of the tax levied upon the property of each and every taxpayer separately in the jurisdiction. In other words, all of these tribunals in their public hearings have before them, open to the inspection of all interested parties appearing therein a complete statement of all the evidence which, up to that time, has been placed before them or has been taken by them for the purposes of their proceedings. This being the status public notice of their hearings is published, whereupon all evidence for or against a rate levied or to be levied *is produced at the public hearing.* The statute, and notice published, giving to interested parties the right to be present and to hear, by reason of this status, all the evidence previously had and to be taken at this public hearing is thus satisfied. There is no particle of evidence taken upon which action is to be had, not open to the inspection of interested parties appearing at these hearings, either as a part of the record or taken in the presence of interested parties appearing at these hearings. *That being true nothing remains to be done but to offer evidence in contradiction thereof or argument thereupon.*

In this case we are denied exactly what in such cases is granted, to wit, inspection of all matters in possession of the Commission upon which they are to proceed to make findings and report.

Moreover, this is a different class of cases. This is one of that different class of cases spoken of in Hagar v. Reclamation District, *supra,* where there is an "inquiry into the weight of evidence." Herein, in lieu of assessment lists and relative valuations, returned by the assessor, or in lieu of statements filed by corporations of their investments, etc., there is upon the secret files of the Commission a complaint or petition alleging certain facts, reports of various officials submitting certain data and other

documentary evidences, specifically evidencing cost of production, cost of labor, cost of materials, cost of power, and other similar costs.

The inquiry here is as to the weight of such evidence. The right to be heard here is upon all the evidence in the case if that right is to be of effective avail. The record is an entirely different one. The right "to be heard" under this statute is not by the statute confined to a *part* of the record upon which the Commission is to proceed. There is no such limitation prescribed by the statute and there is no power in the Commission to so limit this right. An illustration is had in The State v. New Jersey, etc., 25 N. J. Law, 309, at page 311, wherein it was held the state order requiring the board of equalization "to hear and consider any objections" offered to a tax is not complied with when limiting the hearings to written objections filed therewith.

The legal principle here involved and invoked is precisely as long established by this Court in customs appraisement cases.

That a determination by an appraiser or Board of General Appraisers of a question of law in the course of their proceedings in the determination of foreign market value, including foreign costs of production, is reviewable by the courts, and that any error of law therein renders the report to the Collector of findings of fact void and in consequence the Collector's decision as to the amount of duty is likewise void.

The attention of the Court is particularly called to the fact that these cases, like which there are many others decided by this Court over a long period of our history, concerned the taking into or refusing consideration by local customs appraisers or boards of customs appraisers as legal, items and evidences of market value or costs of production; that such ultimately reached and were finally

decided by this Court as legally or illegally so admitted in or regarded as legal evidence, and that thereby the decisions of the Collector based thereupon were void.

Exactly such is the issue here presented.

In *Arthur v. Goddard*, 96 U. S., 145, 147, this Court held that the inclusion of a discount as part of market value by appraising officers was shown by the record to be a decision of a question of law and therefore reviewable by the courts. The court at page 147 said:

> "In this case, the appraisers did not profess to appraise or ascertain the market value of the goods. They simply gave a construction to the invoice; they decided its legal effect to be that 8,670.25 francs is there declared to be the market value of the goods. *They held as a legal proposition*, that, in fixing the value, the discount of two per cent should not be allowed; and, as a result of this, that 8,670.25 francs, and not 8,494.95 francs, was the value."

This Court held in consequence the duty thereupon by the Collector found due and assessed invalid.

So, in United States v. Passavant, 169 U. S., 16, at page 20 this Court said:

> "And while the general rule is that the valuation is conclusive upon all parties, nevertheless the appraisement is subject to be impeached where the appraiser or collector *has proceeded on a wrong principle contrary to law or has transcended the powers conferred by statute.* Oberteuffer v. Robertson, 116 U. S., 499; Badger v. Cusimano, 130 U. S., 39; Robertson v. Frank Brothers Company, 132 U. S., 17; Erhardt v. Schroeder, 155 U. S., 124; Muser v. Magone, 155 U. S., 240.
>
> " * * * Whether the dutiable value in this case was erroneously increased by the unauthorized addition of an independent item to the market value, as asserted by the importers, *was a question of law*, and properly carried to the board of general appraisers by protest and appeal." And as here, from there to this Court.

In *Robertson v. Frank Brothers,* 132 U. S., 17, the appraiser added an *estimated value* to the invoice of shipping charges and labor connected therewith on certain bananas for the shipping of them *into* Aspinwall. The question was whether *actual* shipping charges or *estimated* shipping charges was a rule prescribed by law in such cases. The point was raised that the appraisement was not open to impeachment by the courts. This Court in that case said at page 24:

> "But it is contended that the act of the *appraiser* in making, or requiring to be made, the *additional charges for transportation and labor was final and conclusive,* and cannot be made the subject of inquiry. It is undoubtedly the general rule that the valuation of merchandise made by the appraiser, unappealed from to merchant appraisers, is conclusive. But whilst this is the general rule, it is subject to the qualification that *if the appraiser proceed upon a wrong principle, contrary to law, and this be made to appear,* his appraisement is not unimpeachable. ***This qualification applies*** *to the acts of many other officials charged with duties of a similar character, such as assessors of the value of property for taxation, commissioners for appraising lands taken for improvements, or damages sustained by owners of land and the like."*

This court held the appraisement and collector's levy of duties illegal for the reason stated and affirmed the right of the court to review these questions of law decided by the appraising officers.

In Muser v. Magone, 155 U. S., 240, at page 246, this Court thus stated the rule:

> "The conclusiveness of the valuation of imported merchandise made by the designated officials, in the absence of fraud, is too thoroughly settled to admit of further discussion. Hilton v. Merritt, 110 U. S., 97; Auffmordt v. Hedden, 137 U. S., 310; Passavant v. United States, 148 U. S. 214. * * *

> "Yet, though the valuation is final and not subject to review and change and reconstruction by the verdict of a jury, it is open to attack for want of power to make it, as where the appraisers are disqualified from acting; or have not examined the goods; or *illegal items have been added independent of the value. The principle applied in such cases is analogous to that by which proceedings of a judicial nature are held invalid because of the absence of some strictly jurisdictional fact, or facts essential to their validity.*"

The power of the federal courts to lay hold of the federal jurisdiction and to exercise jurisdiction over all justiciable questions, whenever and wherever by Congress imposed in lay boards, officers, or tribunals, is one that should always be asserted and swiftly accorded. The principle is fundamental to our government, and complete exercise of the federal jurisdiction by the Courts is dependent thereupon. For this day of the creation of the innumerable boards and commissions by the Congress, and the investitute by Congress therein of the decisions or questions of fact as well as of law, makes this necessary in order that the judicial jurisdiction of the United States by the Congress vested in the Courts of the United States should not be divested therefrom and placed in tribunals composed of lay members as final judges of their own legal powers.

There is therefore here presented a justiciable question. The Commission not having proceeded according to law and its regulations as commanded by Congress, which proceedings were by Congress made an express condition precedent to the power of the President to make a finding and proclamation of an estimated rate of duty prescribed in a state of facts by Congress, the President's findings and proclamation were without legal authority and void.

CONGRESS HAS PROVIDED BY EXPRESS STATUTE FOR JUDICIAL REVIEW OF THE "LEGALITY" OF ALL ORDERS AND "FINDINGS" ENTERING INTO AND AFFECTING THE RATE AND AMOUNT OF DUTY ASSESSED UPON IMPORTED MERCHANDISE.

Congress, by Sec. 514 of the Tariff Act of 1922, provided:

> "Protest—all decisions of the Collector, *including the legality of all orders and findings entering into the same,* as to the rate and amount of duty chargeable, and as to all exactions of whatever character (within the jurisdiction of the Secretary of the Treasury), * * * shall be final and conclusive upon all persons, * * * unless protest thereof is within 60 days made."

The italicized words *supra* were added to the then existing law in the same Act (1922) as a separate section thereof, of which Sec. 315a was a member section, upon its first enactment.

Although protest before the then Board of General Appraisers was held the appropriate remedy to judicially determine the constitutionality of tariff acts (*Fields v. Clark,* 143 U. S., 649) the legality of the Secretary's proceedings in fixing the amount of foreign coins (the *Whitridge* case, 197 U. S., 135) and the legality of the Secretary's proclamations as to the bounties (the *Nichols* case, 249 U. S., 34) because all these proclamations affected the "amount of duty", the legality of the Secretary's actions in rejecting certain teas (the *Buttfield* case, 192 U. S., 470), Congress by this amendment, member provision with Sec. 315, vested *specific and express* power in the courts to review *all* "findings" entering into and affecting *the rate or amount of import duties.*

Of this prescribed procedure it is said in *Dodge v. Osborn,* 240 U. S., 120:

> "The remedy of a suit to recover back the tax after it is paid *is provided by statute* and a suit to restrain

> it is forbidden. *The remedy so given is exclusive and no other remedy can be substituted for it.*"

This is the "appropriate proceeding" to "attack the validity of the tariff proclaimed by the President" declared to exist by this Court in the *Norwegian Nitrogen Products Co.* case, 274 U. S. 112.

The protests expressly assail both the Collector's decision, the proceedings and rulings of the Tariff Commission, and the findings and proclamation of the President. Therein this case differs from the mandamus proceeding wherein this Court, in the *Norwegian Nitrogen Products Co.* case, states:

> "But petitioner does not attack the validity of the tariff proclaimed by the President; *nor is this an appropriate proceeding in which to do so.*"

This is that "appropriate proceedings".

Among other things the protest alleges, as follows:

> "We claim that this merchandise is entitled to entry at the rate of 3 cents per pound under paragraph 83, Tariff Act of 1922, and that your action in assessing any other or higher rate of duty is illegal and without due warrant of law. * * * wherefore, your protestant alleges that said proclamation by the President of an increase of the rate of duty upon nitrite, from 3 cents per pound as provided in paragraph 83 of the Tariff Act of 1922, was not made in pursuance with the law, was without any jurisdiction whatsoever, and is invalid and void." (R. 9, 11.)

Elsewhere in the protest it is pointed out in great detail wherein the law had not been pursued by the Tariff Commission and the President as alleged in the protest (R. 8-12).

Apt and pertinent illustration is had in Field v. Clark (143 U. S. 649). Congress, of course, enacted the tariff act (McKinley law) of October 1, 1890. Marshall Field

& Co. of Chicago, upon payment of certain duties at that port, by due protest before the Board of United States General Appraisers (now United States Customs Court), raised the question that in that enactment the Congress, for several specific reasons, *had not followed or observed the Constitution,* and that therefore the act was unconstitutional. If the citizen can challenge the *performances of Congress* as in violation of or because it did not pursue the Constitution in directly fixing a rate of duty, and the appropriate judicial forums therefor are now provided by law, affording final decision by this Court, why can not that right be likewise litigated when Congress fixes the rate in terms of a state of facts authorizing the President to estimate and proclaim the same, and the collector proceeds to and does collect the duty so levied?

An exactly parallel case is Downs v. United States (187 U. S. 496), affirming Downs v. United States (113 Fed. Rep. 144).

The here pertinent point was best expressed in the opinion of the Board of General Appraisers before whom the case arose and whose very meritorious opinion was approved and adopted in full by the Circuit Court af Appeals, in turn affirmed by this Court. Therein the doctrine is thus stated:

> "Under the authority conferred by this law, the Secretary of the Treasury has duly '*ascertained, and declared,* the net amount of the bounty or grant which, in his judgment, was bestowed by the laws of the Russian Government upon the exportations of this sugar. (T. D. 20, 407, dated December 12, 1898; T. D. 22, 814, dated February 14, 1901.) It is not denied by either party to this suit that, if in fact any bounty or grant was bestowed, the Secretary's finding as to its amount was correct. Moreover, it would seem that the decision of that officer as to this particular fact, being made in pursuance of a special authority, would be quite as conclusive on this board and the courts as the finding of the value of foreign coin by the Director

> of the Mint, under the provisions of Section 25 of the tariff act of 1894, a statute strictly analogous, which finding has been held to be conclusive, and not reviewable by this board or the courts. (U. S. v. Klingenberg, 153 U. S. 93, 14 Sup. Ct. 790, 38 L. Ed. 647; Wood v. U. S., 72 Fed. 254, 18 C. C. A. 553, explaining Klingenberg's case; Hadden v. Merritt, 115 U. S., 25, 5 Sup. Ct. 1169, 29 L. Ed. 333.) *It is conceded, however, that the decision of the Secretary as to whether the laws of Russia do in fact bestow such a bounty or grant is reviewable by this board,* as it involves the construction of the laws of Russia relating to the precise subject matter covered by said section 5, above cited. The jurisdiction of the board in this particular has been sustained by the United States Circuit Court of Appeals for the Second Circuit in the recent case of United States v. Hills Bros. Co. (46 C. C. A. 167, 107 Fed. 107)."

For examples of judicial cognizance of acts of the President made in accordance with authorizations by Congress in ascertainment of whether or not such acts were performed *ultra vires* of the authorization may be cited Wilcox v. McConnel (38 U. S. 496, 512), wherein the following pertinent pronouncement was had:

> "Hence we consider the act of the War Department, in requiring this reservation to be made, as being in legal contemplation the act of the President; and consequently that the reservation thus made was, in legal effect, a reservation made by order of the President within the terms of the act of Congress."

To the same effect Wolsey v. Chapman (101 U. S. 755, 770), United States v. Midwest Oil Co. (236 U. S. 459, 468), wherein the famous order of withdrawal of oil lands by President Taft was finally reviewed and upheld by this Court. (See also United States v. Morrison (240 U. S. 192, 212).

Section 315 of the Tariff Act of 1922 makes it mandatory upon the Tariff Commission that in its investigations

under this Section when directed by the President, it * * * shall give reasonable public notice of its hearings, shall give reasonable opportunity to parties interested to be present, to produce evidence, and to be heard". The same Act equally provides that "*No proclamation shall be issued under this Section until such investigation shall have been made.*" None such was made.

The issue seems *stare decisis.*

THERE IS NO PARALLEL BETWEEN THE PROCEEDINGS OF CONGRESS IN THE ENACTMENT OF THE TARIFF LAW AND THE PROCEEDINGS OF THE PRESIDENT AND THE TARIFF COMMISSION IN THE ASCERTAINMENT AND FINDINGS OF FACTS AND THE PROCLAMATION WHEREUPON A RATE OF DUTY IS CONDITIONED BY CONGRESS TO BECOME EFFECTIVE.

Congress is controlled by the Constitution in such and all other enactments. The President and the Tariff Commission are controlled by the Act of Congress vesting in them their respective duties and powers with reference to this subject matter. Both are subject to the jurisdiction of the courts in these proceedings in proper cases made and if in their proceedings either has not pursued the Constitution of the United States or the statutes under and by virtue of which they are respectively acting, that act is void. Thus in *Field v. Clark,* 143 U. S., 649, upon protest before the Board of General Appraisers the intermediate courts and the Supreme Court of the United States reviewed the provisions of the Tariff Act of 1890 in the determination of whether or not Congress had pursued the Constitution of the United States in that enactment. The proceeding as is this was instituted by protest against a decision of a collector of customs.

There is a distinct difference between the constitutional requirements controlling Congress and the statutory re-

quirements controlling the President and the Tariff Commission in such cases. The Constitution does not require Congress to submit to any committee or commission a prescribed investigation of the subject matter as a condition precedent to and before it can constitutionally enact a tariff law. History records the enactment of a tariff law without the same having been submitted to any committee of Congress. If the Constitution of the United States required that before Congress had jurisdiction to act upon a tariff bill it should be submitted to a committe or commission who should thereupon proceed to hold hearings with reference thereto at which interested parties had the right to be present, to produce evidence and to be heard, before the Congress had jurisdiction to enact the tariff law the cases would be parallel. In such cases should Congress proceed to enact a tariff law without such reference and without such hearings unquestionably the courts would have the judicial power to review and declare the same to have been enacted without authority of law, to wit, the Constitution. *Field v. Clark,* 143 U. S., 649.

Such a statute does control the President and the Tariff Commission. It is the mandate of Congress and the condition upon which this power to make findings and proclaim is delegated to the President of the United States. It is expressly delegated upon the condition precedent that before any such is proclaimed the Tariff Commission should have investigated the subject and in that investigation shall have held "hearings" whereof public notice had been given and reasonable opportunity afforded all interested parties appearing to be present, to produce evidence "*and* to be heard." The purpose of this provision of the statute is obvious. It was fully reviewed in the decision of the Court of Appeals of the District of Columbia in the *Norwegian Nitrogen Products Co.* case. The history of the times and the debates in Congress demonstrate that *without this assurance of a hearing upon a subject matter*

wherein the interests of all parties could be exploited under oath and "star chamber" proceedings be prohibited the grant would not have been given the President. It is the express condition precedent to this grant of power by Congress and its mandate was here set at naught.

CLAIMED DUTY OF PROTESTANT TO FURNISH COSTS OF FOREIGN PRODUCTION (TRADES).

While there is much said in the case in an effort to place petitioner in an unfavorable attitude by claiming that it refused to disclose its costs, it is respectfully submitted that there is no provision of law so requiring. *The right to be present, to produce evidence, and to be heard by interested parties is a statutory right, the enjoyment of which is not conditioned upon the interested parties performing a part of the duties of the Commission.* It is an absolute right. It is not granted upon condition or to be bargained for.

Moreover, the record shows that the interested party appearing was *a New York corporation,* selling agents of the foreign producing corporation upon a commission. The New York corporation, therefore, not only *was without data as to costs of production* of its foreign principal, but many business reasons suggest that the foreign principal would be unwilling to disclose these costs to its United States agent. This petitioner has a distinct interest herein other than of its principals.

The Tariff Commission has legal power ample to make a just estimate of foreign costs without such disclosures. (U. S. Code Annotated, Vol. 19, Secs. 100 and 103.) Effective rules therefor have been suggested to Congress and the Commission, neither of which has adopted the same.

In this case, the Government and the Tariff Commission assume a most indefensible position. For, while denying petitioner the right to inspect domestic costs of production, part of the Commission's record, upon the grounds stated

by the Commission that the same were trade secrets in that there were but three such producers in the United States, and that the making public or accessible to petitioner of the costs of *only three* producers would betray the individual costs, and, therefore, betray the individual trade secrets of those producers, which the Commission claimed it was inhibited by law under penalty from doing, nevertheless, from the bench demanded that petitioner betray the individual costs of a *single producer* in Norway, which the Commission had just held trade secrets and something they had no right to disclose to the public, as a condition precedent to the enjoyment of petitioner's statutory rights appearing as an interested party.

If it was unlawful for the Commission to disclose the costs of three American producers, it was unlawful for it to seek to compel the public disclosure of a single foreign producer.

Moreover, the warrant of authority for and direction to the Commission to make this investigation was the Presidential order (R. 68) to make this investigation "in accordance with law *and public interest,*" * * *. Nitrite is used chiefly in making azo dyes which enter into clothing and fabrics used in practically every household of the Nation. The requested increase of duties upon nitrite would be accordingly reflected in additional expenses in every household of the country. The Commission, therefore, would not only violate the presidential mandate but visit a penalty upon every household of the country should punishment be visited upon the petitioner for excusable inability to perform the statutory duties of the Commission or to bargain for its rights.

The Commission has a public service, a service of "public interest" to perform which should not be sacrificed in order to punish an imaginary derelict. Certainly this Honorable Court could not so tolerate or approve individual retaliation as a principle of judicial construction

where the public interest is concerned and a public duty is to be performed. Obviously, rather do the equities favor the petitioner who for nine years has individually borne the great cost and labor of battling not alone for *its* legal rights but the cause of every householder of the land.

CONCLUSIONS.

(A) *The findings and proclamation of the President were void.*—It will not answer these considerations to state that after the Commission's reported investigation (although illegally made) was lodged with the President he could disregard the same (Act of 1922 but not in the current Act of 1930) and personally, or with the aid of other officials, legally make other or different investigations and findings and so proclaim. Congress, by statute and authorized regulations having the effect of law, vested no power in but expressly denied the President any power to make any findings or proclamation in this case *until the legally prescribed* investigation, which includes the said rights of interested parties being legally afforded has been had *by the United States Tariff Commission.* None such was here had. The statute prescribed, "no proclamation shall be issued under this section until *such investigation* shall have been made" *by the Tariff Commission.* The executive order referred this and other applications to the Commission "for such an investigation *as shall be in accordance with the law and the public interest,* under rules and regulations to be prescribed by such Commission." (R. 63, 64.) This investigation was *not* in accordance with law; it was *not* in accordance with the Commission's rules and regulations, and it was *not* in accordance with the *public* interest. It was not such an investigation as Congress commanded. Until "such investigation" is had by the Tariff Commission there is no legal power vested in the President by Congress to make findings or proclamation in this case and all such were *void, regardless of what if any other investi-*

gations or findings the President may have made upon the subject matter. The proclamation, however, shows that there were no other investigations made by the President.

(B) *The power conferred should neither be magnified nor held subject to different rules of law because vested in the President.*—The fact that ultimate finding or proclamation of facts are by this statute vested in the President does not change their importance or character, and does not render the proceedings beyond application of the century-old principles of judicial cognizance established by this Court. The duty is one like in import and character performed by the Secretary of the Treasury in bounty and foreign coin estimation cases, the Postmaster General in fraud cases, and in the Secretary of the Interior in land cases and almost daily and by hundreds of appraisers at every port of entry of the United States many times every day. Abroad, in Canada, Germany, and France like duties are performed by Commissioners of Customs. In Great Britain by the Board of Trade. The United States Court of Customs Appeals in the *J. W. Hampton case, affirmed by this Court* in 276 U. S., 394, thus very succinctly stated the case:

> "It is probable that the Congress conferred upon the President this grant of power with the idea that, because of the great publicity attending the acts of the Chief Executive and his great responsibility to the people, there would be less likelihood of precipitate and ill-advised action, and greater dignity and standing would attend the accomplished act. *But whatever the legislative purpose may have been, the acts of the President thereunder are entitled to no greater significance and should be measured by no other rule than that to be given and used in considering the acts of any other fact-finding official or board which the Congress may have named.*
>
> "The law is not concerned as to the identity or official standing of the person who shall perform the duties

required, but regards only the powers which are granted and the things which may be done as a result of such grant.

"*But when, in the performance of his duties, under this section, the President proclaims a change of duty, if, in so doing, he acts beyond the law or fails to comply with the express mandates, then we can not doubt that the person aggrieved thereby may find adequate relief in the courts.* We need not go beyond the case at bar for an illustration of this. Here the importer has protested against the imposition of additional duties because of the alleged unconstitutionality of the act under which it was imposed, and upon that claim he is entitled to a proper hearing in the courts. *Can it be denied that if, in the imposition of this rate of duty, the President had proceeded without taking the steps directed by section 315, the importer could have set these facts out in his protest and had an adjudication thereon?* To deny this would be to give to the act of the President a peculiar sanctity and inviolability not attaching to the acts of other officials of the Government performing similar fact-finding duties; and this we are neither called upon to do nor justified by the law in doing. We are unable to see why any different rule of law should be applied to the President's finding of facts under section 315 than the one applied to the finding of valuation by an appraiser of merchandise at our ports. In such cases, while the courts have held the finding of valuation made by the appraiser to be conclusive, if he proceeds upon a wrong principle, contrary to law, his acts are subject to judicial control and correction. *Badger v. Cusimano*, 130 U. S. 39; *Robertson v. Frank Bros. Co.*, 132 U. S. 17 (24); *Muser v. Magone*, 155 U. S. 240 (247); *United States v. Passavant*, 169 U. S. 16 (21)."

That decision, ultimately affirmed by this Court, was in principle exactly like this. An importer by protest to the United States Customs Court (formerly Board of U. S. General Appraisers) claimed a rate of duty assessed by the Collector was illegal because Congress had not pursued the law—the Constitution of the United States—but had exceeded its constitutional powers in its enactment of the

flexible tariff, by the exercise of which by the Tariff Commission the rate of duty complained of was estimated and proclaimed by the President.

(C) *The right herein asserted is statutory, the exercise of which is in avoidance of the levy upon and application to importations, an improperly estimated duty already prescribed by Congress.*—It is fallaciously claimed that the Commission and the President *fix the rate* of duty which it thus assailed: "Since nobody has a legal right to the continuance of any customs duty, the hearing provision involved no question of due process." (The hearing provision referred to is that before the Tariff Commission.) The belief that that well-settled totally inapplicable principle of law was here applicable, and so announced in the opinion of the court below (R. 209) demonstrates the lack of true conception of the real issues in and principles of law applicable to and controlling decision of this case.

This argument runs all through the briefs and the opinions of the lower courts upon this subject. It is predicated upon the false assumption that the proceedings before the Tariff Commission as the agency of the President are for the purpose of *making a law fixing a rate of duty.* This is far from the truth. The rate of duty *is already fixed by Congress* itself in a state of facts. The *law* is in all details complete. It is immaterial whether the statutory right to be present, to produce evidence, and to be heard under section 315 is a vested constitutional right affecting property *or an accorded statutory right.* If not the former it is the latter in a proceeding estimating the amount of a tax upon protestant's property as fixed in section 315. It stands exactly in the same category as the hearings afforded under the Interstate Commerce acts and under customs appraisement proceedings wherein the amount of duty prescribed by the statute is determined by the ascertainment of foreign market value, *and in exactly the same position as the rights afforded by protests before the Board of General Apprais-*

ers to a hearing upon the question of whether one rate or another of the tariff act is applicable to the imported merchandise. In fact, the latter is precisely the purpose of this proceeding.

It is not every right to a hearing accorded by the statute which is a right affecting vested interests, nor is it necessary that the statutory right "to be heard" should affect constitutional rights or vested interests in order to be of any force or effect.

It will be noted that this Honorable Court in reviewing the terms of the statute in the case of *J. W. Hampton, Jr. & Co. v. The United States,* (276 U. S., 394) particularly stressed the right "to be heard."

In deciding that case this Court said:

> "*The Tariff Commission does not itself fix duties,* but before the President reaches a conclusion on the subject of investigation the Tariff Commission must make an investigation *and in so doing must give notice to all parties interested to appear, to produce evidence, and to be heard.*"

This statute, Sec. 315, levies a duty and so long as that prescribed duty exists, is not repealed, and until it is changed by the Congress, *it gives a right of property.* The contention here is to have the statute properly applied in estimating the amount of the tax therein laid upon this petitioner's property. Petitioner when before the Commission was not seeking to establish or repeal a rate of duty. Congress had concluded that. Petitioner was contesting the efforts of an American producer to have applied the duty provided by section 315 to his imports rather than the duty fixed by Paragraph 83 of the same Act, exactly as an importer contests the efforts of an American producer under section 516, and the Government under sections 501 and 514, to have taxed a greater duty on his imports.

While an importer has no right to the *continuance* of any legally prescribed duties, he has a legal right to have *all existing legally prescribed duties,* until repealed by Congress,

applied to his importations as and when and to the extent only in said law provided. This importer, therefore, had the legal statutory right afforded him by section 315 to appear before the Commission and insist that the legal conditions precedent to the power of the collector to levy the duties provided in section 315 in lieu of paragraph 83 be complied with before the tax therein levied should be collected upon its importations. That is exactly the right afforded all importers in both classification and appraisement proceedings. *That was its statutory right.* It was to prevent an undue portion of its property being taken *as and for a tax already laid by Congress.* Therein it was insisting not only upon a statutory right but that due process of existing law be exercised in estimating the tax laid upon its property by Congress. The failure to correctly grasp this legislative status necessarily leads to an inaccurate conclusion as to the character and amplitude of the rights by this statute granted and consequent error in decision.

(D) *Trade secrets and processes are in the very nature thereof individual and not collective.*—That *all* costs of an *industry* are or could be trade secrets, or that the disclosure of all costs of an industry could disclose trade secrets, a claim advanced by the Commission, falls of its own inherent weakness. A trade secret of necessity cannot be common to an *industry* or any considerable number therein engaged, for in that case it would not be "secret" but known to many or all. A trade secret necessarily must be known to or employed individually or by a few only. That such *per se* could be disclosed by disclosure of the labor, material, power, or other unit costs of production is absurd. Certainly advantages or superiority in production as found in the markets or disclosed by unit or other costs of production do not and cannot reveal any possible secret methods employed to produce these results. Yet that is the contention of the Commission.

(E) *Apprehension of increased court labors unjustified and not a sound principle of legal construction.*—The apprehension indulged by the court below (R. 210) that decisions in favor of petitioner herein would increase the labors of the court is not a sound principle of judicial construction. Nor is the same in the slightest degree justified by judicial history. Commencing with the decisions of this Court upon the Act of 1842 establishing the judicial power to review every final customs appraisement had, of which there were many *thousands* per year, upon the grounds that the statutory procedure had not been followed, the decisions of the Federal courts, including this Court, witness very few cases wherein their jurisdiction was accordingly invoked. For several years past this judicial power has been practically finally vested in the court below.

In 1930 there were 687 such decisions rendered by single Judges and 68 by divisions of Judges of the United States Customs Court. The total number of decisions by the Court of Customs and Patent Appeals on appeals therefrom were 6. In 1931 there were 369 such decisions by single Judges and 56 by divisions of Judges of the Customs Court. The total number of decisions by the Court of Customs and Patent Appeals on appeals therefrom was 10. The number of cases reaching the United States Court of Customs and Patent Appeals and the Court of Appeals of the District of Columbia, of co-ordinate jurisdiction, involving procedure of the Tariff Commission, have been until recently but 7. Those remaining now undecided will no doubt be finally disposed of by a decision herein upon the merits. These figures completely disprove any possible claim of excessive litigation following a review by the courts of the illegal proceedings of the Tariff Commission upon like grounds.

(F) *History and issues of the controversy.*—It would seem but fair to the Court, in the interest of fair and complete settlement of this nine-year old controversy and

that the United States Tariff Commission as well as the great bodies politic and commercial appearing daily before the Commission may know the exact rights accorded by this statute, to here develop its history and present enforcement status. The statute, in both the Acts of 1922 and 1930, is essentially the same. Repetition will be had for the convenience of the Court. It reads (Act of 1922):

> "Investigations to assist the President in ascertaining differences in costs of production under this section shall be made by the United States Tariff Commission, and *no proclamation shall be issued* under this section until *such* investigation shall have been made. The commission shall give *reasonable public notice of its hearings* and shall give reasonable opportunity to parties interested *to be present, to produce evidence,* and *to be heard.* The Commission is authorized to adopt such reasonable *procedure, rules,* and *regulations* as it may deem necessary."

The clear import of that grant of power by Congress was not only to vest these powers in the Commission, but also commands it to adopt such reasonable procedure and rules as will insure interested parties appearing at its hearings reasonable public notice thereof and reasonable opportunity to be present, to produce evidence *and* to be heard thereat. To effect this purpose in its fullness, Congress granted the President and the Commission plenary powers to adopt such reasonable *procedure, rules* and *regulations* as are necessary to execute said purposes. This is not only a grant of power but a Congressional command to adopt such procedure and make such rules and regulations as will execute the Congressional enactment and purpose *fully* and *fairly.* This grant was not for the benefit of the Commission but for interested parties and the public. Now, has the Commission done this? Under the Act of 1922 it adopted in part the rules hereinbefore quoted. (Exhibit 2, R. 63-67 inc.) They included the following:

"The Commissioner or Investigator in Charge of Investigations.

"The Commissioner or investigator in charge of any investigation shall review all the evidence, oral and written, and all other information gathered in such investigation by the Commission, and shall summarize the same and prepare for the Commission in writing a report.

"Parties who have entered appearance shall, *prior to the filing of briefs,* have opportunity to examine *the report of the commissioner or investigator* in charge of the investigation *and also the record* except such portions as relate to trade secrets and processes.

Briefs.

"Briefs may be filed at the conclusion of the testimony in each investigation. The commissioner or investigator in charge of the investigation shall fix a time within which briefs shall be filed and notice thereof shall be given by registered mail *to all parties of record.*

* * * * * * * * *

Final Hearings and Findings.

"*Final hearings* shall be before the Commission. Parties who have previously entered appearances may file briefs and upon permission being granted by the Commission present oral arguments. *The findings of the Commission and of the members thereof shall be in writing and shall be transmitted, together with the record, certified by the Secretary under the seal of the Commission, to the President for his action under the law.*"

Those rules were in force at the time of the investigation of this case by the Commission and its report to the President. That this petitioner was therein arbitrarily denied its *statutory* rights, but also denied *any semblance of its rights under said rules,* is hereinbefore shown.

Just what promises the Commission then made, and now makes, in order to secure data, are fully set up in its answer in the case, referred to and used as argument against petitioner in its answer herein to the petition for this writ, now pending in the Supreme Court of the District of Columbia. It alleges:

> "For almost ten years, through the full period of the Tariff Act of 1922 and to date under the Act of 1930—the uniform practice of the Commission has been to obtain data by means of cost schedules framed in accordance with accepted accounting practice. The schedule used in the casein investigation, a copy of which is annexed to this answer, marked Exhibit 3, is typical of the form used under both the Tariff Acts of 1922 and 1930. The provision respecting secrecy reads:
>
> > Costs of manufacture and sales by individuals, firms, or companies, will be held strictly confidential and are for the exclusive use of the United States Tariff Commission. *They will not be published in a form which will permit the identification of costs of individual producers.*
>
> This provision was referred to repeatedly in talks with the foreign producers of casein, who furnished their costs of production only upon the understanding and agreement that they would be regarded and treated as confidential matter not to be divulged."

It will be noted that the Commission therein advised all who signed said schedules that they may be published in a form *which will not identify costs of the particular manufacturer.* Obviously, so published, the "promises" made were fulfilled.

The particular case pending in said court concerns casein. A brief recital of its history will be very illuminating here and inform the Court of the complete status of the pending controversy presently and as it may hereafter be presented. That subject has been under investigation by the Commis-

sion since 1923. Under said quoted rules, in 1923 and again in 1924 the Commission served upon interested parties appearing fair summaries of its data collected to date and gave notice of hearings thereupon, with the result that the Commission first referred the matter back for further reports by its investigators and then reported to the President, March 15, 1926, that satisfactory data could not be obtained as to the costs of skim and whole milk in the Argentine, raw materials used in the manufacture of casein, because refused, for a satisfactory basis of findings as to rates. The Commission, however, acting under said rules and said promises as to confidential matter, on March 15, 1926, sent to the President *and published as a public document a complete, detailed and exhaustive statement of the cost data obtained from each casein manufacturer in the United States and the Argentine*, observing its promise of secrecy by substituting ~~letters, A, B, C~~ numbers 1, 2, 3 etc., in lieu of the actual names of the producers. That portion of the report containing the items of costs of production of each producer, domestic and foreign, therein set forth in complete detail are hereto annexed, marked "Exhibit A."

No producer, foreign or domestic, seems to have objected. Obviously, the publication, disguised solely by the substitution of ~~letters~~ numbers for names, did not disclose any alleged or possible trade secrets or processes; nor was that publication deemed by the Commission, or the producers who furnished their cost data, a violation of oaths or promises, for, when the investigation was renewed in 1932 that court record shows complete data including costs of skim and whole milk before refused were given by the producers, foreign and domestic. Obviously the method of public treatment of the cost data by the Commission satisfied the producers and inspired confidence in the Commission's procedure. Equally obviously, no trade secrets or processes were by that method of detail cost publication disclosed. What was there published in detail was here denied, although the Commission

was at all said times proceeding under the same rules. That record demonstrably illustrates how the Commission can and did adopt procedure and rules which will and did afford interested parties substantial compliance with their statutory rights *without violating any official oaths and without jeopardizing the ability to obtain complete data for all purposes.*

The record in the casein case in said Supreme Court referred to and made a part of its argument by the Government herein as aforesaid, further shows the necessity for final judicial definition of the powers of the Commission in these particulars. It shows that the present Commission has revoked all said rules, adopted no equivalent substitute rules, abandoned all said procedure and holds interested parties appearing not entitled at its hearing to cross-examine witnesses as to any cost data offered and claimed "confidential", or to see or to be heard upon any such data in possession of the Commission, and that it can legally deny any such solely on the ground that it is "confidential"! That record shows that witnesses appearing at the "hearings" in the said pending casein cases did not even have to assert their claim that their data offered was "confidential" or "trade secrets" or "processes", for that alleged privilege without being claimed was frequently suggested to witnesses by members of the Commission. That record also shows that in that case interested parties appearing were denied any *summary* of the data before the Commission or inspection of any data *admittedly before the Commission* as to "costs of materials," "costs of labor," "costs of power, heat and supplies," "depreciation and interest on investment," "administration and selling expenses," "production and sales" or "transportation data," on the grounds that such data were "confidential" or "trade secrets."

In that status, and *in the absence of appropriate rules or their due observance,* interested parties appearing before

the Commission are compelled, as here, to invoke the jurisdiction of the Courts for the enforcement of the law *in its fullness as written* in order to secure the right to examine investigators of the Commission and to compel the production of any cost data before the Commission and otherwise secure their legal rights, *far more than may be necessary to a satisfactory exercise of these rights,* because, in the absence of such rules, there is no medium ground provided by law upon which interested parties appearing can assert their legal rights or the court rest decision. Herein the same rules of the Commission were in force but not to any reasonable degree followed. The record shows that they were flagrantly ignored.

From the foregoing it is patent, and it is urged upon the Court that the issues of this case more than any other likely to be presented will enable the Court to finally clarify this entire situation by adjudicating: (a) the true legal interpretation of the statutory rights of interested parties appearing at the "hearings" of the said Commission, to wit, "to be present", "to produce evidence" and "to be heard"; (b) the duty of the Commission to adopt *procedure* and provide *rules* and *regulations* fairly calculated to secure said parties appearing their statutory rights fairly and fully and at the same time protect any trade secrets or processes included within said data; (c) whether or not the rules here in force were calculated to fully afford interested parties appearing their statutory rights; and (d) whether or not the same were herein fairly observed and to adjudicate the duty of the Commission to observe such in its hearings.

In this particular the early, but presently discarded, procedure and rules of the Commission are called to the attention of the Court in illustration of the fact that such procedure and rules are entirely practicable, and that, in the absence of such or similar procedure and rules and their due observance, the proceedings of the Commission are contrary to law, grossly unfair and arbitrary.

The foregoing procedure and rules of the Commission in the early casein cases observed by the Commission, and the results thereby accomplished, completely refute every claim herein made by it that the law as written and the rights of interested parties appearing cannot be fairly and fully observed without hindrance to its effective official proceedings.

The reaction against the aforesaid rulings of the United States Tariff Commission is reflected in the subsequent hearings before the Commission and the Committees of Congress and actions of the Congress. These will show that public bodies numbering thousands of men, such as the American Federation of Labor and the American Farm Bureau have protested these rulings of the Tariff Commission and have continuously asserted the rights herein accorded by the Court of Appeals of the District of Columbia.

By H. R. 6662, 72d Congress, First Session, which passed both Houses of Congress there is provided, in Section 3 (b) "a consumers' counsel". The duties of the consumers' counsel are set forth, as follows:

> "(b) It shall be the duty of the counsel to appear in the interest of and represent the consuming public in any proceeding before the commission. In any proceeding before the commission in which the counsel has entered an appearance, the counsel shall have the right to offer any relevant testimony and argument, oral or written, and to examine and cross-examine witnesses and parties to the proceeding, and shall have the right to have subpœna or other process of the commission issue in his behalf. Whenever the counsel finds that it is in the interest of the consuming public to have the commission furnish any information at its command or conduct any investigation as to differences in costs of production or other matters within its authority, then the counsel shall so certify to the commission, specifying in the certificate the information or investigation desired. Thereupon the commission shall promptly furnish to the counsel the information or promptly con-

duct the investigation and place the results thereof at the disposal of counsel."

From the foregoing it is perfectly apparent that the rulings of the Tariff Commission herein complained of are calculated to make such body a secret commission depriving interested parties appearing of their statutory rights to be present, to produce evidence and to be heard. Wherefore the inevitable result, unless changed by the decree of this Honorable Court, will be enactments similar to the foregoing, destructive of all that is conceded by these proceedings even to the extent that the Tariff Commission has the right to protect matters in the nature of trade secrets, if not of the entire law. It is respectfully submitted that the decisions of the United States Court of Customs and Patent Appeals herein be reversed with directions that the petitioner's protests be sustained.

Respectfully submitted,

MARION DE VRIES,
JESSE P. CRAWFORD,
H. KENNEDY MCCOOK,
Attorneys for Plaintiff.

Dated, Washington, D. C.,
November 12, 1932.

EXHIBIT A.

DOMESTIC PRODUCTION COSTS

The commission obtained certain data in regard to costs of producing casein during the year 1922 from 18 domestic producers out of a total of 74. The output of these 18 manufacturers represented about 70 per cent of the total production of casein during that year. These data were secured in accordance with a schedule prepared by the commission and were subsequently checked back to books of record of each manufacturer by representatives of the commission.

With respect to the production costs of casein, the commission found that the fundamental difficulty was the ascertainment of the cost of the raw material—skimmed milk. Little difficulty was experienced in ascertaining costs of converting skimmed milk into casein. Conversion costs were in most cases set up by each company although certain charges—chiefly overhead expenses—were kept jointly with other dairy products, and the selection of some method of allocation was necessary to determine the portion to be charged to casein. Table 7 shows, by companies, costs of converting skimmed milk into casein in the United States. The costs as shown do not include any charges for interest actually paid nor for interest on capital employed or invested in the business.

TABLE 7.—*Domestic costs per pound of converting skimmed milk into casein, by companies, 1922*

Company No.	Acid	Direct labor	Containers	Other factory expense	General expense[1]	Total conversion cost
1	$0.0045	$0.0061	$0.0010	$0.0116	$0.0017	$0.0249
2	.....	.0155	.0010	.0137	.0014	.0316
3	.....	.0165	.0009	.0186	.0025	.0385
5	.0030	.0182	.0012	.0151	.0103	.0478
6	.0038	.0158	.0031	.0261	.0067	.0555
7	.0030	.0143	.0010	.0276	.0118	.0577
8	.....	.0180	.0014	.0152	.0183	.0529
9	.0030	.0160	.0010	.0194	.0211	.0605
10	.0016	.0120	.0010	.0362	.0049	.0557
11	.0030	.0109	.0010	.0334	.0174	.0657
12	.0030	.0168	.0010	.0308	.0159	.0675
13	.0015	.0105	.0010	.0544	.0123	.0797
14	.0030	.0267	.0010	.0306	.0141	.0754
15	.0032	.0188	.0010	.0264	.0046	.0530
17	.0010	.0116	.0024	.0116	.0075	.0341
18	.0030	.0216	.0010	.0471	.0096	.0823
16	.0025	.0143	.0020	.0069	.0050	.0307
Weighted average	.0019	.0141	.0013	.0211	.0084	.0468

[1] No interest actually paid or interest on capital invested or employed in the business has been included.

Attempts at evaluation of skimmed milk.—The commission found that domestic manufacturers used various methods for arriving at the value of skimmed milk to be charged against the cost of production of casein. These various methods are summarized as follows:

1. The companies producing casein either purchased or sold skimmed milk. This price was considered as the cost of the skimmed milk used in making casein. The casein produced under these conditions represented 28.2 per cent of the output for which costs were obtained by the Tariff Commission.

2. Those companies purchasing whole milk under Dairymen's League contracts, valued their skimmed milk at the price set in those contracts. Other companies in the same territory although not purchasing from the Dairymen's League used the league's value as the cost of their skimmed milk. The casein produced under these conditions represented 26.8 per cent of such output.

3. Some cooperative associations paid what was in effect a bonus upon skimmed milk instead of paying dividends upon capital stock. The casein produced under these conditions represented 23.9 per cent of such output.

4. In the case of certain subsidiary companies, more or less of an arbitrary price was paid to the parent company for skimmed milk. These companies produced 20.6 per cent of such output.

Largely because of these varying and conflicting methods of arriving at the value of skimmed milk, the commission made a further investigation of the price paid by casein manufacturers for whole milk and the quantity and value of the various products made from such milk. The purpose was to arrive at a value of skimmed milk by some method of allocating a portion of the cost of whole milk directly to casein.

In Table 8, which follows, will be found the result of this effort, showing by companies the cost of whole milk, the total value of all products made from such whole milk, the value of casein produced, and the ratio of sales from casein to the aggregate sales return from all products. It also shows the portion of the cost of whole milk allocated to casein on this computation of relative sales return and the resulting unit cost per pound of casein. In this table an effort has been made to segregate the costs for those companies with respect to which it seemed possible to separate the whole milk used in the manufacture of casein and an equivalent cream product from that used in making other skimmed milk products. In the case of other companies shown in this table it was impossible from records of the companies to separate whole milk which was converted into casein and a cream product from other whole milk which was converted into other skimmed milk products.

TABLE 8.—*Comparison of domestic cost of whole milk and value of products produced therefrom by casein manufacturers, 1922*

Company No.	Products made other than casein	Cost of whole milk	Selling value of all products	Selling value of casein	Ratio of casein sales to total sales	Cost of whole milk allocated to casein	Material cost per pound casein
A—COMPANIES PRODUCING ONLY CASEIN AND EQUIVALENT IN CREAM OR BUTTER							
3	Butter	$526,929.83	$592,496.53	$49,712.96	8.39	$44,209.41	$0.0862
8	do	169,693.92	217,764.32	11,666.28	8.83	9,095.58	.0883
10	Butter, milk sugar, albumen	191,205.57	220,484.66	25,417.10	9.09	22,041.86	.0909
12	Butter	165,733.15	224,438.24	12,046.94	8.07	8,899.87	.0807
13	Cream, milk sugar, albumen	495,668.48	1,492,361.38	64,044.50	4.29	21,271.55	.0430
15	Butter (sold some skim)	128,256.89	169,929.02	17,445.46	10.27	13,167.26	.0761
17	Cream	471,461.09	518,615.84	39,818.45	5.23	36,208.21	.0523
	Weighted average (A)	2,148,948.63	3,486,089.99	220,151.69	7.21	154,693.74	.0666
B—COMPANIES PRODUCING CASEIN AND ALTERNATE SKIMMED MILK PRODUCTS							
1	Cream, condensed; milk sugar, albumen	$451,023.19	$820,256.99	$38,299.40	4.67	$21,059.15	$0.0398
2	Butter, cream, cheese; buttermilk, skim	1,742,003.51	3,648,231.54	35,910.61	.98	17,147.05	.0425
6	Butter, cream, some whole; cheese, evaporates, skim	44,671.27	62,859.47	3,416.37	5.44	2,427.85	.0785
7	Butter, condensed; powder, poultry feed	625,197.16	1,017,666.68	2,233.14	.22	1,371.68	.0671
9	Cream, powder; butterfat	324,620.67	466,409.42	29,162.52	6.25	20,298.58	.0760
11	Not detailed	196,137.73	316,166.40	1,028.92	.32	638.30	.0471
14	Cream, condensed; cheese, poultry feed	255,644.60	395,185.09	6,910.29	1.75	4,471.22	.0707
16	Butter, cream, condensed	492,217.35	658,252.10	21,070.24	3.20	15,755.88	.0626
18	Butter, cheese	405,520.01	563,210.58	1,322.52	.23	948.02	.0784
	Weighted average (B)	4,537,035.49	7,948,258.27	139,354.01	1.85	84,118.58	.0528
	Weighted average (A and B)	6,685,984.12	11,384,348.26	359,505.70	....	239,012.32	.0610

ARGENTINE PRODUCTION COSTS

Duly authorized agents of the Tariff Commission obtained costs of production from five companies in Argentina. Based on exports, these companies produced about 67 per cent of the total output in that country. In Argentina the value of skimmed milk is generally calculated by deducting from the price of whole milk the receipts from the butterfat obtained therefrom. Table 9 shows the cost of converting skimmed milk into casein in Argentina as indicated by the data.

TABLE 9.—*Conversion cost of casein in Argentina, 1922*

[Per pound]

Company No.	Direct labor	Containers	Other factory expense	General expense[1]	Total conversion cost
1	$0.0107	$0.0023	$0.0147	$0.0045	$0.0322
2	.0107	.0020	.0186	.0020	.0333
3	.0148	.0025	.0170	.0016	.0359
4	.0145	.0021	.0201	.0101	.0468
5	.0067	.0026	.0135	.0038	.0266
Weighted average	.0127	.0024	.0170	.0052	.0373

[1] No interest paid or interest on capital invested or employed in the business has been included.

The commission, in its further investigation to secure additional data in regard to the cost of production of casein, requested manufacturers in Argentina, who had previously furnished the commission with conversion costs of making casein, for data as to the quantity and value of whole milk used in making casein, and the quantity and sales value of the products made from such whole milk. Argentine manufacturers declined to reveal such data to the commission. For this reason it was necessary to resort to prices of the various constituents of whole milk in order to compute the price of raw material used for casein. The representatives of the commission obtained from the Argentine Ministry of Agriculture the prices shown in Table 10 for butter, casein, and butterfat. These prices represent transactions in the Buenos Aires market and those for butterfat are representative of whole milk prices, since whole milk is sold on the basis of its butterfat content.

TABLE 10.—*Butter, butterfat, and casein prices at Buenos Aires, 1922 and 1923*

[From Argentine Ministry of Agriculture]
[Average price per pound]

Month	1922 Butter	1922 Butterfat	1922 Casein	1923 Butter	1923 Butterfat	1923 Casein
January	$0.1541	$0.1541	$0.0570	$0.2875	$0.2960	$0.1546
February	.1747	.1648	.0641	.3126	.3194	.1726
March	.1883	.1817	.0644	.3359	.3023	.1552
April	.2546	.2337	.0773	.2970	.2074	.1437
May	.2632	.2385	.0791	.2119	.2038	.1304
June	.2842	.2777	.0939	.2232	.2007	.1261
July	.3839	.3431	.1058	.2327	.2249	.1195
August	.3342	.3441	.1144	.2527	.2602	.1106
September	.3560	.3398	.1159	.2837	.2912	.1159
October	.3412	.3087	.1222	.2867	.2499	.0957
November	.3036	.2461	.1247	.2414	.2414	.0639
December	.2681	.2733	.1383	.2454	.2454	.0650
	.2755	.2588	.0964	.2675	.2535	.1211

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1932.

No. 272.

NORWEGIAN NITROGEN PRODUCTS COMPANY, *Petitioner*,

v.

THE UNITED STATES.

On Writ of Certiorari to the United States Court of Customs and Patent Appeals.

MEMORANDUM FOR PETITIONER IN REPLY TO MEMORANDUM FOR THE UNITED STATES SUBMITTING REPORTS OF THE UNITED STATES TARIFF COMMISSION TOGETHER WITH LETTER FROM THE TARIFF COMMISSION AND THE SCHEDULES ANALYZING THE REPORTS.

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IN THE

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The Memorandum submitted by the United States of Reports by the United States Tariff Commission is in support of its contention that Departmental Practices of the Commission therein asserted are here pertinent as supporting an invoked rule of construction. It is supplemental to subdivision (v), page 28, of the brief of the United States. Since the Tariff Commission submits therewith an argument, some considerations anent the subject are here offered. The rule involved in Departmental Practice.

Departmental Practice is but one of many rules of construction which, even if shown applicable, may or may not be adopted by the Court in the presence of other considerations deemed controlling.

The applicable rule thereto relating is succinctly set forth in *Merritt v. Cameron*, 137 U. S., 542, 551, as follows:

> "A regulation of a department, however, *cannot repeal a statute;* neither is a construction of a statute by a department charged with its execution to be held conclusive and binding upon the courts of the country, unless such construction *has been continuously in force for a long time.* The cases cited go to that extent and no further. In regard to the law under consideration the construction of it by the Treasury Department *has not been uniform.* The construction contended for by defendants in error first arose in 1876 and lasted only until 1885, since which time the construction has been the same as in this decision. There is no such *long and uninterrupted acquiescence* in a regulation of a department, or departmental construction of a statute, as will bring the case within the rule announced at an early day in this court, and followed in many cases, to wit, that *in case of a doubtful and ambiguous law* the contemporaneous construction of those who have been called upon to carry it into effect is entitled to great respect, and should not be disregarded without the most cogent and persuasive reasons. *Edwards v. Darby,* 12 Wheat., 206; *United States v. Hill,* 120 U. S. 169, 182; *Robertson v. Downing,* 127 U. S. 607; *and many other cases.*" (Italics ours.)

"It is resorted to only in doubt." *United States v. Tanner,* 147 U. S., 661.

The philosophy of the rule is that where rights of property have been acquired under a ruling of a governmental department these should not be lightly interferred with nor divested by a contrary ruling. This philosophy does not extend to remedies.

The statute which it is sought to in effect repeal by the alleged practice of the Commission is subdivision (c) of Section 315 of the Tariff Act of 1922, reading:

> "(c) * * * Investigations to assist the President in ascertaining differences in costs of production under this section shall be made by the United States Tariff Commission, and no proclamation shall be issued under this section until such investigation shall have been made. The commission shall give reasonable public notice of its *hearings* and shall give reasonable opportunity to parties interested *to be present, to produce evidence, and to be heard.* The commission is authorized to adopt such reasonable procedure, rules, and regulations as it may deem necessary." (Italics ours.) (Petitioner's brief, p. 2.)

The rules promulgated thereunder and in effect at the time of this hearing and until November 25, 1930, read:

> "The Commissioner or Investigator in charge of any investigation shall review *all the evidence,* oral and written, and *all other information gathered in such investigation* by the Commission, and shall summarize the same and prepare for the Commission *in writing a report.*
>
> "Parties who have entered appearances shall, *prior to the filing of briefs,* have opportunity to examine *the report of the commissioner or investigator* in charge of the investigation *and also the record* except such portions as relate to *trade secrets and processes.*" (R. 66.)
>
> "Briefs may be filed at the conclusion of the testimony in each investigation. The commissioner or investigator in charge of the investigation shall fix a time within which briefs shall be filed and notice thereof shall be given by registered mail to all parties of record.
>
> Final Hearings and Findings.
>
> "*Final hearings* shall be before the Commission. Parties who have previously entered appearances may

> file briefs and upon permission being granted by the Commission present oral arguments. The findings of the Commission and of the members thereof shall be in writing and shall be transmitted, *together with the record,* certified by the Secretary under the seal of the Commission to the President for his action under the law." (R. 67.)

These rules have the effect of law. Not only do the submitted Practices fail to meet the aforesaid legal requirements but in substance they confirm Petitioner's claims that in the particular case the Commission not only failed to follow the law and its own regulations, but departed from its *usual* procedure and practice, denying Petitioner any semblance of benefit thereof.

The following general principles, it is respectfully submitted, render inapplicable, upon one or the other of the following grounds, all of the said submitted matter:

(a) The Practices and procedure of the Tariff Commission under the Act of 1916 and prior to the enactment of the flexible tariff, with the therein-provided "hearings," have been declared by this Court inapplicable to proceedings under the flexible tariff. This Court has so held *upon substantially this record,* presented to the Court in the earlier case, *Norwegian Nitrogen Products Company v. The United States Tariff Commission,* 274 U. S., 106. This Court therein, at page 111, ruled:

> "* * * Section 703 of the Revenue Act of September 8, 1916, under which the Commission was created, requires it to make certain specified studies of the administration and operation of the tariff laws of the United States and tariff relations of the United States with foreign countries, on request to the President and certain Committees of the two houses of Congress. ***That Act has no relevancy here since, unlike the Act of 1922, it contains no provisions for hearings in conjunction with the investigations there authorized.***" (Italics ours.)

(b) The Practice contended for by the Government, if at all relevant, would in effect repeal the foregoing statute and violate the usual procedure of the Commission prescribed in the aforesaid rules as a part of the law.

(c) There has been no long-continued practice effective in this case. Certainly, as held aforesaid, the practice of the Commission under a different statute before the enactment of the flexible tariff have no relevancy here. That brings the matter up to September 22, 1922, the date of the enactment of the flexible tariff. The rules of the Commission applicable at the time this case arose and was concluded were promulgated during October, 1922. The application of the American Nitrogen Products Company, the subject of this controversy, was filed with the Commission during the month of October, 1922. The hearings wherein it is asserted the Commission denied Petitioner its rights and exercised legal powers and authorities not warranted by law, were had during the months of September and October, 1923.

The departmental practice or procedure, therefore, applicable to this case, authorizing and supporting the particular rulings of the Commission made herein denying Petitioner's requests, must have been that in existence, uniform and long-established, *at the time of the making of said rulings,* to wit, at or before October, 1923. Certainly, Petitioner's rights fixed by statute and regulations in force at the hearings of September and October, 1923, cannot be legally destroyed by a Practice which must be uniform, long-established and in question and which was admittedly not had until and during *years thereafter,* if at all.

Certainly the limited time of one year between the enactment of the flexible tariff and the conclusion of the rulings complained of, less than one year, is not such under any decision as would justify the Court in adopting the same as a Departmental Practice sufficiently long established to repeal a statute or to become an established rule of con-

struction. Certainly it will not be held that one of the parties to a controversy can, *subsequent to said controversy,* so conduct itself as to establish by practice a rule of construction supporting its acts long before done plainly unwarranted by exprsss statute and contrary to the rules at the time of said hearings and many years thereafter in full force and effect.

(d) The Practice asserted to justify the rulings complained of in this case has been contested since the time said rulings have been made and is now being contested. This record so shows, not only by this but other court proceedings herein adverted to by the United States. These alleged Practices, therefore, cannot be said to be within the doctrine of this Court set forth in *Merritt v. Cameron, supra,* to have been "long," of "uninterrupted acquiescence" or "uniform".

(e) The alleged Practices of the Commission were during all the time of their alleged continuance inhibited by the statute and established rules of the Commission. They could not repeal that statute nor revoke said rules.

The limited time allowed for answer to said Memorandum will not permit detail analysis. Indeed, such would not seem necessary by reason of the manifest inapplicability thereof to the issues of the case.

The question here presented is whether or not parties appearing at the publicly noticed Hearings of the Commission, *when proceeding under the flexible tariff,* are entitled to question applicants as to the *costs* of production alleged in their complaint, be furnished with a *complete* copy thereof, and inspect such cost data as has been gathered by the Commission's investigators under said statute and rules in order to exercise the statutory rights of such interested parties appearing "to produce evidence *and* to be heard."

Neither the Memorandum produced nor the argument of the Commission thereto-annexed is shown to contain cost data demanded, furnished or denied *in a contested pro-*

ceeding under the flexible tariff, but includes solely certain Reports of the Commission to the President or its Annual Reports made long after "hearings" were concluded by the Commission and not under any statutory or regulative control or command.

Said Memorandum divides cost data, the subject of its said reports, into three classes:

(a) Reports in which cost data are shown by companies identified only by a number or symbol.

(b) Reports in which costs are shown only as averages.

(c) No cost data, or merely cost differences or domestic and foreign costs expressed as percentages of each other.

These several classifications prove a lack of uniformity in the Practices of the Commission were they here relevant.

Numerous detail explanations follow each. These include such "costs not published because publication would reveal operations of manufacturers and disclose *confidential* information *contrary to the provisions of Sec. 708, Revenue Act of 1916*". That section not only does not here apply, but does not prohibit the publication of "*confidential* information". It prohibits only *investigators* of the Commission giving out "*trade secrets*". It does not apply to the Commission when as such holding "Hearings".

There is not any law that prohibits "the Commission" at any time disclosing "confidential information" or "operations" of "individual companies" during its "hearings". That doctrine as held by this Court is correctly synopsized in the syllabus of *St. Louis Railway Co. v. Interstate Commerce Commission,* 264 U. S., 64, as follows:

> "This claim of the carrier should not be denied upon the ground of public policy, *nor upon the ground that the evidence was given the Commission in confidence.*"

While as a matter of policy the Commission's procedure in all such reports as shown may be commendable, it has no relevancy in such cases as this, wherein an applicant is seeking to cripple competition or drive competitors out of our markets by invoking a procedure based on the alleged difference in his and their costs of production. In such cases, common justice demands that the complainant should disclose and prove his costs, subject to scrutiny and cross-examination. See Petitioner's brief, pages 5 and 6. The statutory "hearings" so imply. Petitioner's brief, pages 34 to 41, inclusive.

Even were these Reports of the Commission here relevant, they and the three classes of cost forms therein enumerated show that even when not so required by statute and its rules, it is the practice of the Commission to in some way or form, as by number or symbol, or by averages, or some form of relative costs, publish costs of production. Indeed, that of casein, set forth as Exhibit A at page 12 of Petitioner's brief, like numerous others in the Government's Memorandum, demonstrates the fallacy of the Government's contention.

The arbitrary, unfair and illegal rejection of Petitioner's demands herein is shown by the item under (c) of the Government's memorandum, to wit: "Sodium nitrite * * * no costs disclosed, because costs were obtained from only two domestic companies." That is this case. The Memorandum refers to the Report to the President (R. 195, Exhibit 16) made long after the hearings had closed. That is not here material. Neither is any of the long lists of "Reports to the President" submitted in the Memorandum herein by the Government. These are all submitted long after hearings were closed and not under any statutory or regulative control.

The cost data refused Petitioner herein by the Commission are the cost data contained in the Complaint without deletion (R. 160, Exhibit 8) and in the "SUMMARY" sub-

mitted (R. 164, 165) *at the hearing* upon demand of Petitioner for information as to the alleged costs it had to meet as an opposing interested party appearing.

(a) While the Commission states no costs were submitted in the *Report to the President* because there were but two domestic producers, it *did* submit in the Summary the estimated costs *in detail of the single producer in Norway.* (R. 172.)

(b) It refused to submit any domestic costs, though the record shows such in the possession of the Commission because claimed "trade secrets" (R. 171) and that therefore the Commission was inhibited by Sec. 708 of the Revenue Act of 1916 from publishing such alleged trade secrets although *public records!*

(c) Nor did nor does the Commission promise to keep confidential the information it receives. Its own statement in court so shows. It only promises not to publish the same *in a manner that will disclose individual costs.* See Petitioner's brief, page 66.

(d) Though it appears from the Summary (R. 164) that the Commission had domestic costs in its possession, as part of the complaint and as gathered by its investigators, inspection of which was duly demanded by Petitioner (R. 147-149), it refused to permit Petitioner to inspect the same, and at no time or place, or in any Summary or Report, or otherwise, did it permit Petitioner the slightest knowledge or inspection thereof either as costs of production of individual factories or averages thereof, or by percentage expression, or as a measure of differences in costs, foreign and domestic or otherwise. Petition was denied all and every such information, contrary to the Commission's own rules, contrary to law, and contrary to what it now exhibits

to this Court as its practice to publish in numerous other cases.

Respectfully submitted,

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No. 272

In the Supreme Court of the United States

OCTOBER TERM, 1932

NORWEGIAN NITROGEN PRODUCTS COMPANY,
PETITIONER

v.

THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CUSTOMS AND PATENT APPEALS

BRIEF FOR THE UNITED STATES

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BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinions of the United States Customs Court (Judge Sullivan announcing the decision, Judge McClelland concurring, and Judge Brown dissenting) (R. 37–61) are reported as T. D. 44824, 59 Treas. Dec. 921. The opinion of the United States Court of Customs and Patent Appeals is reported as T. D. 45674.

JURISDICTION

The judgment of the Court of Customs and Patent Appeals was rendered May 2, 1932. (R. 213.)

Petition for certiorari was filed August 1, 1932. A certificate of importance had been filed by the Attorney General with the Court of Customs and Patent Appeals before the decision of that court. (R. 199.) The jurisdiction of this Court, which is not contested by the United States, is invoked under section 195 of the Judicial Code as amended by the Act of February 13, 1925. (U. S. C., Title 28, sec. 308.) The petitioner also refers to the 1931 Supplement of the Code, embodying section 647 of the Tariff Act of 1930, c. 497, 46 Stat. 590, 762. The United States submits that section 647 of the 1930 Act does not apply to the present controversy, which was pending when the section was enacted. Sec. 651 (c), 46 Stat. at 763, U. S. C., Sup. V, Title 19, sec. 1651 (c).

QUESTION PRESENTED

Whether the petitioner was entitled to inspect all of the data submitted to the Tariff Commission.

STATUTES INVOLVED

The pertinent provisions of the Act of September 21, 1922, and of the Act of September 8, 1916, are set forth in the Appendix.

STATEMENT

This controversy has been before the United States Tariff Commission and the courts for nine years. The petitioner represents in the United States a Norwegian company which is the only manufacturer of sodium nitrite in that country and

is the leading foreign exporter of that product to the United States. It challenges the validity of the investigation by the Tariff Commission, under the flexible-tariff provisions of the Tariff Act of 1922, which preceded the proclamation by President Coolidge increasing the duty on sodium nitrite from 3 cents per pound to 4½ cents per pound. In its petition and brief in the present case (pp. 4, 16, 17) the petitioner claims that the commission did not afford to the petitioner reasonable opportunity to produce evidence and to be heard. The record, however, shows clearly that, unless the company had a right to inspect data which had been submitted to the commission in confidence, it was given all reasonable opportunity which could be given by the commission to contest the requested increase in duty. The case, therefore, turns upon the question whether the company had a right to inspect such data.

In October, 1922, the American Nitrogen Products Company submitted to the Tariff Commission a request for a report and recommendation to the President that the duty on sodium nitrite be increased 50 per cent, setting forth that its plant was closed because it was unable to meet foreign competition. (R. 160–163, and repeated in R. 165–167.) The Commission on March 27, 1923, ordered an investigation and gave public notice of its order. (R. 68.) The next steps were as set forth in the opinion of this Court in *United States ex rel. Nor-*

wegian Nitrogen Products Company, Inc., v. *United States Tariff Commission*, 274 U. S. 106, 108, 109:

> Representatives of the Commission, in the course of its investigation, proceeded to Norway and Germany and sought from the Norwegian company and from German manufacturers data showing the cost of production of sodium nitrite in those countries. This was refused. The Commission's experts were permitted to examine the books and records of American manufacturers, obtaining information of the domestic cost of production and other relevant data. This information was given under promise that it would be treated as confidential and upon the assurance that the rules of the Commission and sec. 708 of the Revenue Act of September 8, 1916, c. 463, 39 Stat. 756, 798, so required. Section 708 prohibits the Commission from revealing "the trade secrets or processes" of which it might learn in the course of its investigations.
>
> After making its investigation, the Commission ordered a public hearing to be held on September 10, 1926 [1923]. * * *
> On September 15, 1923, the Commission made a preliminary report stating the results of its inquiry. The report contained a review of the data in the possession of the Commission, including an estimate of the cost of production in Norway, based upon such public sources in Norway as were available to it, both the Norwegian company and the plaintiff having refused to give any information on the subject.

These statements were based upon the record in that case at pp. 50 et seq. The public hearing on September 10, 1923, of which the commission gave notice on July 20, was held in order to enable interested parties to produce evidence and be heard. (Record in present case, 69.) Hearings were held down to and including October 6, 1923 (R. 82, 70, 146), and the interested parties were then given further time in which to file briefs (R. 158). The nature of the brief filed by the petitioner at that time is set forth on pages 55 and 56 of the record in the case against the Tariff Commission, cited above. As shown in the record in the present case, the American company which had applied for an increase in the rate of duty agreed to public disclosure of its costs of production if the Norwegian company would furnish the cost data for its product. This offer was not accepted. (R. 176.) The petitioner was given opportunity to offer evidence to the commission, to make oral argument, and to file briefs, but requests to cross-examine the commission's field examiners and to inspect the original and primary data gathered by them were refused. (R. 147–149, repeated R. 186–187.)

The Norwegian Nitrogen Products Company then petitioned the Supreme Court of the District of Columbia for a writ of mandamus directing the commission to disclose the information sought. This petition was dismissed on April 18, 1924, with a memorandum opinion which was printed in the record in that case. (1926 Term, No. 91, R. 78–87.)

An appeal was taken to the Court of Appeals of the District of Columbia. There was no order restraining further action by the commission and the Supreme Court of the District of Columbia had decided in its favor. While the appeal was pending the commission made a report to the President, and on May 6, 1924, he proclaimed an increase of duty. (R. 196.) The question of a further hearing before the Tariff Commission thus became moot, and the Court of Appeals so decided on April 6, 1925, 6 F. (2d) 491, but at the same time it declared that the petitioner had been entitled to learn from the commission all information received by it, however confidentially, which did not come within its definition of trade secrets. On error this Court remanded the case with directions to dismiss the petition as moot. (274 U. S. 106.)

It will be noted that the American company had stated that an increase in the rate of duty was necessary in order to enable it to compete successfully with foreign producers; that in March, 1923, the commission gave public notice that an investigation was being undertaken; that a careful study of available sources of information was made by the experts of the commission; and that the petitioner was given ample opportunity to present the facts concerning its own principal and did not take advantage of that opportunity. Justice to the American company required that the hearings should not be prolonged unnecessarily. It also required that the conclusions of the commission should be re-

ported to the President with all reasonable dispatch.

After the President had in May, 1924, proclaimed an increase in the duty on sodium nitrite, the petitioner made further importations of that commodity, and on February 24, 1925 (R. 7) and September 9, 1925 (R. 8), it filed protests against assessments of duty at the rate fixed by the President, claiming that the increase in duty by him was invalid, upon the ground that the Tariff Commission had not given to interested parties reasonable opportunity either to be present or to be heard (R. 10), and that the President had not made any independent investigation of the subject (R. 11). The Customs Court, one judge dissenting, overruled these protests. (R. 37–62.) This judgment was affirmed, without dissent, by the Court of Customs and Patent Appeals. (R. 200–214.)

ARGUMENT

The Tariff Act of 1922 established the following procedural requirement (Act of September 21, 1922, c. 356, sec. 315 (c), par. 2, 42 Stat. 858, 943, U. S. C., Title 19, sec. 156, par. 2):

> Investigations to assist the President in ascertaining differences in costs of production under this section shall be made by the United States Tariff Commission, and no proclamation shall be issued under this section until such investigation shall have been made. *The commission shall give reason-*

> *able public notice of its hearings and shall give reasonable opportunity to parties interested to be present, to produce evidence, and to be heard.* The commission is authorized to adopt such reasonable procedure, rules, and regulations as it may deem necessary. (Italics ours.)

An important limitation upon the power of the commission was established by the Act of September 8, 1916, c. 463, sec. 708, 39 Stat. 756, 798, U. S. C., Title 19, sec. 105, which provided:

> It shall be unlawful for any member of the United States Tariff Commission, or for any employee, agent, or clerk of said commission, or any other officer or employee of the United States, to divulge, or to make known in any manner whatever not provided for by law, to any person, the trade secrets or processes of any person, firm, copartnership, corporation, or association embraced in any examination or investigation conducted by said commission, or by order of said commission, or by order of any member thereof. * * *

But while the commission was forbidden to divulge "trade secrets or processes," it does not follow that it was obliged to divulge all of the information in its possession except "trade secrets or processes." Unless such obligation was otherwise imposed upon the commission it is not necessary to consider the precise meaning of those terms. The history of the adoption of the provision of the 1922 Act, quoted above, is set forth in an appendix to

this brief. It shows clearly that when the law was enacted Congress did not intend to require the commission to make public all of the evidence which was before it except that which it was forbidden by law to divulge. Such publicity was not required by the terms of the Tariff Act. Unless the rules of the Tariff Commission required it to disclose to interested parties the information received by it, or unless the hearing was comparable to a hearing before a judicial tribunal, the commission was not obliged to disclose such matters as it considered confidential.

The Tariff Commission had interpreted its own rules at the outset of this investigation. It had shown that information as to costs of production was a trade secret within the meaning of that term as used by the commission. The sworn answer of the members of the commission to a petition by the present petitioner for a writ of mandamus to require the commission to divulge information which the commission regarded as confidential declared:

> And respondents say that the information and access thus obtained by this Commission was furnished by said companies, including the American Nitrogen Products Company, upon the faith of said statute and upon the consequent understanding, recited in the forms and schedules of the Commission, that the costs of individual persons, firms, or corporations would be held strictly confidential and were for the exclusive use of the Commission and would be published only in such

manner as would not divulge the operations of individual manufacturers. (*United States of America ex rel. Norwegian Nitrogen Products Co.* v. *United States Tariff Commission,* 1926 Term, No. 91, R. 58.)

The commission may well have anticipated just such a situation as developed in this case, where the exclusive agent of a foreign manufacturing company, which refused to reveal its own costs, claimed that not merely the commission but this representative of the Norwegian manufacturer was entitled to obtain exact information respecting the costs of production and business secrets of American concerns. The commission very properly gave assurances to those from whom it secured confidential information that such information would not be given to their competitors.

The question, then, remains whether the hearing to which interested parties are entitled is comparable to a hearing before a judicial tribunal.

It is entirely clear upon the face of the statute that the functions of the Tariff Commission are in no sense judicial. Under Section 315 of the statute the President is authorized, upon investigation of the differences in costs of production of articles provided for in the dutiable list of the act wholly or in part the growth or product of the United States and of like or similar articles wholly or in part the growth or product of competing foreign countries, to ascertain said differences and determine and as-

certain any changes in classification or increases or decreases in rates of duty which are shown by the ascertained differences in cost of production to be necessary to equalize the same. The new rates of duty become effective after thirty days after proclamation.

It is provided in Section 315 (c) that the President, in so far as he finds it practicable, may take into consideration certain elements of advantage to the foreign competitor. It is then provided that investigations to assist the President in ascertaining differences in costs of production shall be made by the United States Tariff Commission, and that no proclamation changing the rates of duty shall be issued until such investigation shall have been made.

Thus it appears that the responsible and effective action under that section is that of the President. He is authorized to investigate and to ascertain the differences in cost of production. And the investigation by the Federal Tariff Commission is merely to aid the President in the performance of his functions, which are in no sense judicial. He may entirely disregard the investigation made by the Tariff Commission and base his conclusions upon information not considered by and not known to the Commission. The Commission determines nothing. It merely investigates differences in cost of production, and its investigation is designed solely to assist the President in ascertaining these

differences. The scheme of the statute has no resemblance to a judicial determination of facts affecting individual rights. It has no such effect, because no one has a right to question the duties to be imposed under the authority of the United States upon future importations. In such a statute the provision that interested parties shall be given a reasonable opportunity to produce evidence and to be heard can not be designed to change the fundamental character of the purely administrative investigation so that it shall take on the characteristics of a judicial hearing. And yet it appears that the petitioner's case stands solely upon the words "and to be heard" in Section 315 (c), and upon the petitioner's implication that the hearing accorded is necessarily judicial in character. We submit that the frame and purpose of the statute show that these words support no such implication, and are fully complied with if interested parties are afforded an opportunity to appear, present their evidence, and to make argument. To this extent the petitioner was afforded full opportunity to be present, to produce evidence, and to be heard.

The petitioner relies upon sections of the Interstate Commerce Act and decisions thereunder to define what is meant by a hearing; but those sections and decisions have no application here. The section of the Interstate Commerce Act directing the manner of conducting hearings before that commission is worded differently and has an en-

tirely different background. While the fixing of rates for service by carriers is legislative, nevertheless the fixing of rates affects property rights, and a rate so fixed may operate to confiscate property. The sections of the Interstate Commerce Act providing for hearings are framed on the theory that that commission should act judicially and conduct its hearings accordingly.

The decision in *Interstate Commerce Commission* v. *Louisville & Nashville R. R. Co.*, 227 U. S. 88, and other cases cited by the petitioner, dealt with hearings that were judicial or quasi judicial, construed statutes differently phrased and relating to different subjects, and dealt with cases where the action resulting from the hearing did affect rights of property which were entitled to judicial protection. Such authorities have no application to the case of changes in tariffs on imports, which affect no property rights in any legal sense, and with respect to the amount of which, at no stage, has an importer or manufacturer a right to a judicial hearing.

The same distinction is to be made between the present case and those relating to administrative hearings on exclusion and deportation of aliens, where rights of personal liberty, protected by the Fifth Amendment, are affected.

A similar contrast was afforded in the Tariff Act of 1922 itself. Section 501 (42 Stat. at 966, U. S. C., Title 19, sec. 381), which dealt with appeals by importers from the decision of the appraiser to the

Board of General Appraisers, provided that the General Appraiser who considered the appeal—

> shall give reasonable notice to the importer and to the person designated to represent the Government in such proceedings of the time and place of the hearing, at which the parties and their attorneys shall have an opportunity to introduce evidence and to hear and cross-examine the witnesses of the other party and to inspect all samples and all papers admitted or offered as evidence. * * *

But for this express provision the importer would have no right to cross-examine witnesses and inspect evidence. That was the rule under the Revised Statutes, which contained no such express provision. *Auffmordt* v. *Hedden,* 137 U. S. 310. In *Origet* v. *Hedden,* 155 U. S. 228, 238, the Court said that "if the importer is afforded such notice and hearing as enables him to give his views and make his contention in respect to the value of his goods, he cannot complain." The absence from section 315, relating to hearings before the Tariff Commission, and the presence in section 501, relating to hearings before the Board of General Appraisers, of express provisions allowing cross-examination of witnesses and inspection of all evidence produced, refutes the petitioner's contention.

The question being one of statutory construction and of the intent of Congress in the use of the words "to be heard," the considerations above mentioned

lead to the conclusion that in the Tariff Act of 1922 Congress did not use those words in the same sense that the word "hearing" is used in immigration cases, and did not intend that the hearings before the Tariff Commission should have all the features of judicial or quasi-judicial proceedings, but, on the contrary, should be similar to the customary hearings before legislative committees.

The petitioner claims that the decision of the Court of Customs and Patent Appeals is in conflict with the decision of the Court of Appeals of the District of Columbia in 1925. But there is no conflict of decision. There is simply a conflict between a definite decision in the present case and an elaborate dictum in the earlier case.

Its petition and brief (pp. 2, 10, 28) cite the opinion of this Court in *United States ex rel. Norwegian Nitrogen Products Co.* v. *United States Tariff Commission,* 274 U. S. 106, as authority for their proposition that the Court of Appeals of the District of Columbia had decided that case upon the merits; but the opinion of this Court does not support that statement. What this Court said was (p. 110):

> The Court of Appeals affirmed the judgment, holding that the case had become moot by the action of the President in fixing the new rate of duty. Notwithstanding this determina-

> tion, it reviewed the case at length and announced its conclusion on the merits. * * *
>
> We conclude that the case had become moot before the review below and that it is unnecessary for us to indulge in a discussion of the merits.

This Court knew, and the court of the District of Columbia knew when it announced its decision, that the case had become moot eleven months before the Court of Appeals of the District of Columbia rendered its opinion. It is true that the lower court discussed a question which it was powerless to decide in that case; but its expression of views did not constitute a decision.

There is now pending in the Supreme Court of the District of Columbia a case in which one business organization is seeking to secure from the Tariff Commission information which rival business organizations gave to the commission in confidence. The Supreme Court of the District of Columbia may feel constrained to follow the dictum announced by the Court of Appeals of the District of Columbia.

CONCLUSION

The question is one of general importance, but we believe it has been correctly decided in the Court of Customs and Patent Appeals. There is no existing conflict of decisions, but the dictum in the Court of Appeals of the District leaves the law uncertain in the courts of the District and a

conflict is quite likely to arise in pending litigation. While we do not believe this is a case which falls within the rules of practice of this Court in granting writs of certiorari, we are not disposed to oppose the granting of a writ if in the exercise of its discretion the Court deems the case worthy of review.

Respectfully submitted.

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SEPTEMBER, 1932.

APPENDIX

STATUTES INVOLVED

Section 315 of the Tariff Act of 1922, c. 356, 42 Stat., 858, 941–943, provided:

> (a) That in order to regulate the foreign commerce of the United States and to put into force and effect the policy of the Congress by this Act intended, whenever the President, upon investigation of the differences in costs of production of articles wholly or in part the growth or product of the United States and of like or similar articles wholly or in part the growth or product of competing foreign countries, shall find it thereby shown that the duties fixed in this Act do not equalize the said differences in costs of production in the United States and the principal competing country he shall, by such investigation, ascertain said differences and determine and proclaim the changes in classifications or increases or decreases in any rate of duty provided in this Act shown by said ascertained differences in such costs of production necessary to equalize the same. Thirty days after the date of such proclamation or proclamations such changes in classification shall take effect, and such increased or decreased duties shall be levied, collected, and paid on such articles when imported from any foreign country into the United States or into any of its possessions (except the Philippine Islands, the Virgin Islands, and the islands of Guam and Tutuila): *Provided,* That the total increase

or decrease of such rates of duty shall not exceed 50 per centum of the rates specified in Title I of this Act, or in any amendatory Act.

(b) That in order to regulate the foreign commerce of the United States and to put into force and effect the policy of the Congress by this Act intended, whenever the President, upon investigation of the differences in costs of production of articles provided for in Title I of this Act, wholly or in part the growth or product of the United States and of like or similar articles wholly or in part the growth or product of competing foreign countries, shall find it thereby shown that the duties prescribed in this Act do not equalize said differences, and shall further find it thereby shown that the said differences in costs of production in the United States and the principal competing country can not be equalized by proceeding under the provisions of subdivision (a) of this section, he shall make such findings public, together with a description of the articles to which they apply, in such detail as may be necessary for the guidance of appraising officers. In such cases and upon the proclamation by the President becoming effective the ad valorem duty or duty based in whole or in part upon the value of the imported article in the country of exportation shall thereafter be based upon the American selling price, as defined in subdivision (f) of section 402 of this Act, of any similar competitive article manufactured or produced in the United States embraced within the class or kind of imported articles upon which the President has made a proclamation under subdivision (b) of this section.

The ad valorem rate or rates of duty based upon such American selling price shall be

the rate found, upon said investigation by the President, to be shown by the said differences in costs of production necessary to equalize such differences, but no such rate shall be decreased more than 50 per centum of the rate specified in Title I of this Act upon such articles, nor shall any such rate be increased. Such rate or rates of duty shall become effective fifteen days after the date of the said proclamation of the President, whereupon the duties so estimated and provided shall be levied, collected, and paid on such articles when imported from any foreign country into the United States or into any of its possessions (except the Philippine Islands, the Virgin Islands, and the islands of Guam and Tutuila). If there is any imported article within the class or kind of articles, upon which the President has made public a finding, for which there is no similar competitive article manufactured or produced in the United States, the value of such imported article shall be determined under the provisions of paragraphs (1), (2), and (3) of subdivision (a) of section 402 of this Act.

(c) That in ascertaining the differences in costs of production, under the provisions of subdivisions (a) and (b) of this section, the President, in so far as he finds it practicable, shall take into consideration (1) the differences in conditions in production, including wages, costs of material, and other items in costs of production of such or similar articles in the United States and in competing foreign countries; (2) the differences in the wholesale selling prices of domestic and foreign articles in the principal markets of the United States; (3) advantages granted to a foreign producer by a foreign government, or by a person, partnership, corpora-

tion, or association in a foreign country; and (4) any other advantages or disadvantages in competition.

Investigations to assist the President in ascertaining differences in costs of production under this section shall be made by the United States Tariff Commission, and no proclamation shall be issued under this section until such investigation shall have been made. The commission shall give reasonable public notice of its hearings and shall give reasonable opportunity to parties interested to be present, to produce evidence, and to be heard. The commission is authorized to adopt such reasonable procedure, rules, and regulations as it may deem necessary.

The President, proceeding as hereinbefore provided for in proclaiming rates of duty, shall, when he determines that it is shown that the differences in costs of production have changed or no longer exist which led to such proclamation, accordingly as so shown, modify or terminate the same. Nothing in this section shall be construed to authorize a transfer of an article from the dutiable list to the free list or from the free list to the dutiable list, nor a change in form of duty. Whenever it is provided in any paragraph of Title I of this Act, that the duty or duties shall not exceed a specified ad valorem rate upon the articles provided for in such paragraph, no rate determined under the provision of this section upon such articles shall exceed the maximum ad valorem rate so specified.

* * * * *

The Act of September 8, 1916, c. 463, sec. 708, 39 Stat. 756, 798, U. S. C., Title 19, sec. 105, provided:

It shall be unlawful for any member of the United States Tariff Commission, or for any employee, agent, or clerk of said commis-

> sion, or any other officer or employee of the United States, to divulge, or to make known in any manner whatever not provided for by law, to any person, the trade secrets or processes of any person, firm, copartnership, corporation, or association embraced in any examination or investigation conducted by said commission, or by order of said commission, or by order of any member thereof. * * *

LEGISLATIVE HISTORY OF PROVISION AS TO HEARINGS

While several Senators had said that hearings would be necessary before new rates were established by the President (62 Cong. Rec., pt. 6, p. 5885; pt. 11, pp. 11155, 11156), the committee made no move toward placing such a provision in the bill until August 11, when it proposed (62 Cong. Rec., pt. 11, p. 11229) to insert in the Act the words:

> The commission is authorized to hold such hearings and to adopt such procedure, rules, and regulations as it deems necessary for adequate investigation under this section; and it shall give such opportunity as it deems necessary or proper for the presentation of material facts in each case and arguments thereon. The commission shall prepare its findings in the case of each proceeding under this section, and the President shall make such findings public as soon as practicable after the issuance of a proclamation under the provisions of this section.

In the Senate this provision was amended (62 Cong. Rec., pt. 11, pp. 11231, 11232) to read:

> The commission shall give reasonable public notice and shall give reasonable opportunity to parties interested to be present and to produce evidence and to be heard. Such

> hearings shall be public. Subject to the foregoing, the commission is authorized to adopt such reasonable procedure, rules, and regulations as it may deem necessary. The commission shall prepare its findings in the case of each proceeding under this section, and the President shall make such findings, hearings, and testimony public as soon as practicable after the issuance of a proclamation under the provisions of this section.

This provision was changed in conference (62 Cong. Rec., pt. 12, p. 12627) to read as it stood in the 1922 law. The entire paragraph as enacted was as follows:

> Investigations to assist the President in ascertaining differences in costs of production under this section shall be made by the United States Tariff Commission, and no proclamation shall be issued under this section until such investigation shall have been made. The commission shall give reasonable public notice of its hearings and shall give reasonable opportunity to parties interested to be present, to produce evidence, and to be heard. The commission is authorized to adopt such reasonable procedure, rules, and regulations as it may deem necessary.

The managers on the part of the House reported (62 Cong. Rec., pt. 12, p. 12660):

> The action of the conferees eliminates the provision of the Senate amendment that the Tariff Commission hearings shall be public and that the President shall make the findings, hearings, and testimony in all proceedings public as soon as practicable after the issuance of a proclamation.

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No. 272

In the Supreme Court of the United States

OCTOBER TERM, 1932

NORWEGIAN NITROGEN PRODUCTS COMPANY,
PETITIONER

v.

THE UNITED STATES

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CUSTOMS AND PATENT APPEALS

BRIEF FOR THE UNITED STATES

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The opinion of this Court in *United States ex rel. Norwegian Nitrogen Products Company, Inc.,* v. *United States Tariff Commission,* which involved the investigation which is at issue in this case, is reported in 274 U. S. 106. The opinion of the Supreme Court of the District of Columbia in that

case is unreported. It is printed as Appendix C to this brief, *infra,* pp. 78–94. The opinion of the Court of Appeals of the District of Columbia is reported in 6 F. (2d) 491.

JURISDICTION

The judgment of the Court of Customs and Patent Appeals was rendered May 2, 1932. (R. 213.) A certificate of importance had been filed by the Attorney General with that court before it rendered its decision. (R. 199.) The company petitioned for certiorari on August 1, and that petition was granted October 17, 1932. (R. 215.) The jurisdiction of this Court rests upon section 195 of the Judicial Code as amended by the Act of February 13, 1925. (U. S. C., Title 28, sec. 308.)

QUESTION PRESENTED

After an investigation by the Tariff Commission, President Coolidge proclaimed an increase in the duty on sodium nitrite. The petitioner contests assessments of duty at the higher rate, contending that during the investigation the Commission did not accord an adequate hearing to the petitioner.

The only substantial question is whether under the law and under the facts of this particular investigation the petitioner was entitled to have access to information concerning the costs of operation of petitioner's business rivals acquired by the Tariff Commission from inspection of private books under

a rule and pledge that the information should not be made public. The petitioner was obviously given ample opportunity to present its own case.

STATUTES INVOLVED

The pertinent provisions of the Act of September 21, 1922, and of the Act of September 8, 1916, are set forth in Appendix A, *infra,* pp. 35–40.

STATEMENT

The petitioner is the exclusive agent within the United States of a Norwegian company which is the leading exporter of sodium nitrite to this country. (R. 145, 171, 197.) It contends that in 1923 when the Tariff Commission, acting under the flexible-tariff provisions of the Tariff Act of 1922, investigated the domestic and foreign costs of producing that commodity it did not give to the petitioner such a hearing as was required by statute and that therefore the subsequent proclamation by President Coolidge increasing the duty on sodium nitrite from 3 to 4½ cents per pound was invalid.

In October, 1922, the American Nitrogen Products Company submitted to the Tariff Commission a request for a report and recommendation to the President that the duty on sodium nitrite be increased 50 per cent, setting forth that its plant was closed because it was unable to meet foreign competition. (R. 160–163, and repeated in R. 165–167.) The Commission on March 27, 1923, ordered that an investigation be made, declared that a

public hearing would be given at some date to be fixed thereafter, and gave public notice of this order. (R. 68.)

The Commission then made an investigation. (R. 164.) The Norwegian company refused to give to investigators of the Tariff Commission access to its cost records relating to sodium nitrite, and it was necessary to obtain from other sources the information as to production costs in that country. (R. 172.) American costs of production were secured from two or three companies. (R. 171, Appendix B, pp. 53, 54.) This information was treated by the Commission as confidential because domestic manufacturers claimed that their costs were "trade secrets" within the meaning of section 708 of the Revenue Act of 1916. (R. 171, 172.)

On July 20, 1923, the Commission gave public notice that on September 10 all parties interested would be given an opportunity to appear before the Commission, to produce evidence and to be heard with regard to differences in the costs of producing sodium nitrite. (R. 69.)

On September 10 (R. 82–146) the petitioner appeared and asked for a complete copy of the request for an increase of rates, with all of the data set forth therein (R. 85). The president of the American Nitrogen Products Company protested that the Commission had promised that confidential information would be treated as such, and the chairman of the Commission assured him that the

Commission would keep that promise. (R. 85, 131.) This president was examined at length. So far as appears, he had already given to the investigators for the Commission all of the information which was referred to at the hearing. (See R. 94, 103, 129, 135.) The witness, however, declined to state publicly his costs of labor, power or material, on the ground that it was competitive information, which had been theretofore furnished to the Commission but which he did not care to disclose to competitors. (R. 138.) The petitioner did not wish to present any testimony. (R. 142.)

On September 15 the Commission made public a report or summary of information secured by it. (R. 70, 163.)

On September 24 the chairman of the Tariff Commission wrote to counsel for the petitioner that (R. 176)

> The Commission is informed that the American Nitrogen Products Company, the applicant in this case, agrees to disclose its cost of production data if the opposition, the Norwegian Nitrogen Products Company, will furnish cost data for the Norwegian product. So far as the Commission is informed up to the present time this offer has not been accepted.

On September 26 another hearing, of which notice had been given on September 10 (R. 146), was held. The petitioner asked for a further extension of time but was unwilling to promise to furnish at

that time the definite figures of cost in Norway. (R. 73.) The Commission (R. 76) ruled that—

> according to the statute, the issue in this case is the difference in the cost of production. As counsel for one of the parties, you knew months ago that the issue would depend upon or turn upon the difference in cost of production. The Commission will rule that in its opinion you have had ample time to prepare a statement of costs of production for your clients and meet the issue at the hearing before the Commission, and will decline the request for a further extension of time for hearings in this case.

It later extended to October 4 (R. 78) and then to October 6 (R. 81) the time in which the petitioner might present its case.

On October 2 (R. 185) the Commission transmitted to the petitioner's counsel its rulings refusing to allow him to inspect the data collected by investigators for the Commission or to cross-examine such men as to cost data but allowing him to present evidence concerning costs of production in the United States. (R. 147–149; repeated R. 186–187.) On October 6 the petitioner was given until the following Tuesday the opportunity to file a brief which might include documentary evidence. (R. 158–159.) At the same hearing petitioner's counsel when asked whether he intended to offer any testimony responded—

> No. All the information which I shall offer to the Commission will be printed as a part of the brief. (R. 152.)

That such a brief was filed may be inferred. (See Appendix, *infra*, p. 69.)

On December 12, 1923, the petitioner applied to the Supreme Court of the District of Columbia for a writ of mandamus directing the Commission to disclose the information sought. The Commission filed an answer which is printed as Appendix B to this brief (p. 41) not in order to establish any fact recited therein which is not supported by the evidence in the record of the case at bar, but as the Commission's unanimous statement of its position with reference to the issues here presented, which are the same as those presented in the prior suit. The petition was dismissed on April 18, 1924, with a memorandum opinion which is printed as Appendix C to this brief (p. 78). An appeal was taken to the Court of Appeals of the District of Columbia. There was no order restraining further action by the Commission and the Supreme Court of the District of Columbia had decided in its favor. While the appeal was pending the Commission made a report to the President, and on May 6, 1924, he proclaimed an increase of duty. (R. 196.) The question of a further hearing before the Tariff Commission thus became moot, and the Court of Appeals so decided on April 6, 1925, 6 F. (2d) 491, but at the same time declared that the petitioner had been entitled to learn from the Commission all information received by it, however confidentially, which did not come within its

definition of trade secrets. On error this Court remanded the case with directions to dismiss the petition as moot. *United States ex rel. Norwegian Nitrogen Products Company, Inc.*, v. *United States Tariff Commission*, 274 U. S. 106.

It will be noted that the American company had stated that an increase in the rate of duty was necessary in order to enable it to compete successfully with foreign producers; that in March, 1923, the Commission gave public notice that an investigation was being undertaken; that a careful study of available sources of information was made by the experts of the Commission; and that the petitioner was given ample opportunity to present facts concerning its own principal and any other relevant evidence or information. Such evidence as the petitioner desired to present was received and considered. Information regarding costs of production obtained by the Commission through the inspection of private books was not disclosed to petitioner. The refusal to disclose this information is sought to be made the basis for the contention that the Presidential proclamation was void.

After the President had in May, 1924, proclaimed an increase in the duty on sodium nitrite, the petitioner made further importations of that commodity, and on February 24, 1925 (R. 7), and September 9, 1925 (R. 8), it filed protests against assessments of duty at the rate fixed by the President, claiming that the increase in duty by him was

invalid, upon the ground that the Tariff Commission had not given to parties interested reasonable opportunity either to be present or to be heard (R. 10), and that the President had not made any independent investigation of the subject (R. 11). The Customs Court, one judge dissenting, overruled these protests. (R. 37–62.) This judgment was affirmed, without dissent, by the Court of Customs and Patent Appeals. (R. 200–214.)

SUMMARY OF ARGUMENT

The only question which is involved in this case is whether the Commission denied to the petitioner a reasonable hearing when it refused to disclose the data which it treated as confidential.

The petitioner was not entitled to that information. The investigation was not judicial in character. It was made in order to assist the President in adjusting the flexible tariff. The Commission was not determining existing rights of parties. It was not an arbiter in a contest in which each contestant was entitled to see all of the evidence. The Commission itself sought for the facts through its own experts and its public hearings were merely parts of a broader investigation. Such an inquiry need not be conducted in the same manner and with the same limitations as a judicial inquiry.

The character of tariff investigations before the enactment of the 1922 law and the legislative history of section 315 show that while that section

included a provision that the Commission should "give reasonable opportunity to parties interested to be present, to produce evidence, and to be heard," Congress did not intend to confine the Commission to public hearings for the ascertainment of facts.

Comparison with other statutes and with other provisions of the Tariff Act of 1922 does not support the contention that the Commission was required to disclose the operations of individual manufacturers.

No statute, Executive Order, or regulation of the Commission required the disclosure of the information which was here treated as confidential.

ARGUMENT

I

THE ONLY QUESTION WHICH IS INVOLVED IN THIS CASE IS WHETHER THE COMMISSION DENIED TO THE PETITIONER A REASONABLE HEARING WHEN IT REFUSED TO DISCLOSE THE DATA WHICH IT TREATED AS CONFIDENTIAL

The petitioner was given abundant opportunity to prepare and present its own case. Public notice of the investigation was given in March. Special agents of the Commission called upon the petitioner's principal for information. Public notice of the hearing was given in July. The petitioner was given opportunity to present testimony on September 10 and on September 26; and it was allowed to file data and argument on October 9.

The petitioner can not fairly complain that it was not given sufficient opportunity to lay before the Commission everything which it considered relevant.

The petitioner, however, points out that the Tariff Act of 1922 granted to it a right to a reasonable hearing and contends that this right included disclosure of the data presented by other parties. Its own foreign principal refused to disclose its costs of production even in confidence and was unwilling to disclose such data even upon condition that the American Company would do likewise. (R. 176.) And yet the petitioner claims that because the Commission refused to reveal American costs which had been given to it in confidence and refused to allow the petitioner to examine the agents who had secured such data, the Commission denied to the petitioner the hearing which was allowed by statute.

The case, therefore, turns upon the question whether such disclosure was an essential part of the hearing which was granted by the Tariff Act of 1922. That act (Act of September 21, 1922, c. 356, sec. 315 (c), par. 2, 42 Stat. 858, 943, U. S. C., Title 19, sec. 156) provided that

> Investigations to assist the President in ascertaining differences in costs of production under this section shall be made by the United States Tariff Commission, and no proclamation shall be issued under this sec-

> tion until such investigation shall have been made. The Commission shall give reasonable public notice of its hearings and shall give reasonable opportunity to parties interested to be present, to produce evidence, and to be heard. The Commission is authorized to adopt such reasonable procedure, rules, and regulations as it may deem necessary.

II

AN INVESTIGATION BY THE COMMISSION UNDER SECTION 315 OF THE TARIFF ACT OF 1922 WAS NOT JUDICIAL OR QUASI-JUDICIAL IN CHARACTER. IT WAS NOT NECESSARY TO CONDUCT IT LIKE A JUDICIAL PROCEEDING

The Commission's investigation was for the purpose of assisting the President to establish a tariff rate which would apply only to the future and which would apply alike to all persons importing sodium nitrite into the United States. It was not conducted in order to enable the Commission or the President to decide what were the existing rights of individuals.

Such a proceeding was not judicial in character. As this Court said in *Prentis* v. *Atlantic Coast Line Co.*, 211 U. S. 210, 226, a case involving railroad rates:

> A judicial inquiry investigates, declares and enforces liabilities as they stand on present or past facts and under laws supposed already to exist. * * * Legislation on the other hand looks to the future and changes existing conditions by making a new rule to

> be applied thereafter to all or some part of those subject to its power. The establishment of a rate is the making of a rule for the future, and therefore is an act legislative and not judicial in kind, * * *

In *Knoxville* v. *Knoxville Water Co.,* 212 U. S. 1, 8, the Court further discussed this point, saying that—

> the function of rate-making is purely legislative in its character, and this is true, whether it is exercised directly by the legislature itself or by some subordinate or administrative body, to whom the power of fixing rates in detail has been delegated. The completed act derives its authority from the legislature and must be regarded as an exercise of the legislative power.

See also *Louisville & N. R. Co.* v. *Garrett,* 231 U. S. 298, 308; *Keller* v. *Potomac Electric Power Co.,* 261 U. S. 428, 440. When a commission studies facts in order to assist the President in deciding what specific tariff rates he should ordain prospectively, its investigation is not judicial in character.

Nor is the investigation quasi-judicial. The rate of duty ultimately proclaimed by the President applies to all importers. His decision establishing it is unlike the adjudication of a controversy between individuals. It is unlike the adjudication of facts peculiar to a particular producer or importer. It is not like the valuation of a railroad,

such as was involved in *United States ex rel. St. Louis S. W. Ry. Co.* v. *Interstate Commerce Commission,* 264 U. S. 64, 78, nor is it like the changing of the rates charged by a particular railroad company upon the ground that that company has charged unreasonable rates, a problem which was involved in *Interstate Commerce Commission* v. *Louisville & N. R. Co.,* 227 U. S. 88. It neither determines nor affects the rights of any particular individual or corporation. Legislative in character the investigation is not surrounded by the requirement of due process, and in the absence of statute no one would be entitled to a hearing either before the Commission or the President. Congress may name any rate of tariff it wishes, *Buttfield* v. *Stranahan,* 192 U. S. 470, or it may authorize the President to carry out its policy declared in the statute. *Hampton & Co.* v. *United States,* 276 U. S. 394. Whichever method is followed the result is the determination of the lawful rate. In this process the individual citizen is in no way concerned and has no right to be heard unless some statute gives him the right.

As the investigations by the Tariff Commission differ from judicial and quasi-judicial hearings in purpose and effect, the rules observed in such hearings do not necessarily constitute the most appropriate rules to be observed by the Commission. A court acts as an arbiter between two opposing parties who come before it and present the mer-

its of their respective sides. The Tariff Commission, on the other hand, is authorized to seek for the essential facts itself and make investigations of business in a business-like way, sending its experts to producers who are involved and getting the production costs in great detail directly from the ordinary private books of the producers wherein all expenditures have been recorded. (Revenue Act of September 8, 1916, c. 463, sec. 706, 39 Stat. 756, 797, U. S. C., Title 19, sec. 100, quoted in Appendix A, p. 35.) Such methods of procedure are fully as appropriate to the work of the Tariff Commission as judicial proceedings are appropriate to an ordinary case in court. The Commission need not rely mainly upon public hearings. Such hearings are merely parts of much broader investigations.

III

THE CHARACTER OF TARIFF INVESTIGATIONS BEFORE THE ENACTMENT OF THE 1922 LAW AND THE LEGISLATIVE HISTORY OF SECTION 315 OF THAT LAW SHOW THAT THAT SECTION DID NOT OBLIGE THE COMMISSION TO FOLLOW JUDICIAL PROCEDURE IN ITS INVESTIGATIONS

In the framing of tariff laws committees and subcommittees of each house of Congress have held hearings which consisted mainly in receiving oral and written statements from men who were not under oath and were not subjected to cross-examination. In the debates in Congress in the 1922 session members told of matters within their own knowledge and referred to committee hearings, let-

ters and telegrams, trade papers, statements by government officials, and reports prepared by the Tariff Commission. There is no reason to think that any of the information thus placed before the Congress was secured through hearings at which witnesses were cross-examined.

It is true that under the Revenue Act of 1916 (Act of September 8, 1916, c. 463, secs. 706, 707, 39 Stat. 756, 797, U. S. C., Title 19, secs. 100, 101; see also Act of September 21, 1922, c. 356, sec. 318 (f), 42 Stat. 858, 947) the Tariff Commission was authorized to subpœna witnesses and conduct hearings and that, where necessary, men could be forced both to testify and to furnish records to the Commission; but there is no sign that even where there were such hearings they were characterized by cross-examinations; and the Commission and its agents secured information from other sources, including records, papers, and other information in the possession of other departments of the Government. The method of investigation appears from a report of the Tariff Commission presented to the Senate by the chairman of the finance committee while the Tariff Act of 1922 was under consideration. (62 Cong. Rec., pt. 11, p. 11345.) The Commission said—

> * * * manufacturers of whiting were requested to submit their costs of production in accordance with a detailed schedule submitted by the Tariff Commission. The reports of the various manufacturers were

> tabulated and later verified by comparison with the books of the companies by members of the commission's staff. * * *
>
> The cost of imported whiting in the following pages was determined by a study of the invoices of shipments of whiting received at the port of New York for the months of April and May, 1922.

The report of the Tariff Commission on The Woolgrowing Industry, 1921, also shows how its investigations were conducted. The Commission held "conferences" which were open to the public, and all persons who were interested were invited to attend and submit any data which they might desire (pp. 462–592), but the report shows that the Commission did not rely entirely on these public hearings for information. Witnesses do not appear to have been cross-examined at the conferences. The report, as the Commission said (p. 28)—

> has been prepared only after examination of a great many sources of information. Field work, correspondence, public hearings, conferences with many authorities on various phases of the industry and with those concerned with sheep husbandry, and the cooperation of experts in foreign countries have made possible this survey of conditions in the wool-growing industry throughout the world.

When tariff legislation was under consideration such methods of investigation as have been outlined were customarily pursued by congressional

committees, by the Tariff Commission, and by Congress itself. This must have been known to every member of Congress and to President Harding, who had served in the Senate for nearly six years; and the basic purpose of the 1922 legislation respecting the Tariff Commission was not to change its methods of investigation. The President recommended and Congress adopted new legislative provisions extending the powers of the Tariff Commission and of the President; but this was for the purpose of making the tariff more flexible. In his annual address to Congress on December 6, 1921, President Harding said (62 Cong. Rec., pt. 1, p. 37):

> Doubtless we are justified in seeking a more flexible policy than we have provided heretofore. I hope a way will be found to make for flexibility and elasticity, so that rates may be adjusted to meet unusual and changing conditions which cannot be anticipated. * * * I know of no manner in which to effect this flexibility other than the extension of the powers of the Tariff Commission, so that it can adapt itself to a scientific and wholly just administration of the law.

When the Finance Committee reported the 1922 tariff bill to the Senate (67th Cong., 2d sess., Senate Doc. No. 187), it proposed an amendment to the House bill which empowered the President to change tariff rates (sec. 315); but the proposed

section said nothing whatever as to the manner in which the preliminary investigation should be made. (62 Cong. Rec., pt. 7, p. 7108, pt. 11, pp. 11155, 11156, 11193.) The essential purpose of the amendment, as shown by its language and by the remarks of members of the Senate, was to recognize the need of flexibility in rates in view of changing conditions in Europe. (62 Cong. Rec., pt. 6, pp. 5874, 6509, pt. 9, p. 9088, pt. 10, pp. 10144, 10145, pt. 11, pp. 11155, 11186, 11193, 11229.) Members of the Finance Committee expressed unwillingness to concede that the President should act only on information received from the Tariff Commission. (62 Cong. Rec., pt. 11, pp. 11153, 11154, 11193.) Subsequently, after the chairman of the Finance Committee had received a letter from President Harding recommending that Congress name the Tariff Commission as the source of information and recommendation upon which the President might proclaim changes in rates of duty (62 Cong. Rec., pt. 11, p. 11211), the committee proposed and the Senate accepted (62 Cong. Rec., pt. 11, pp. 11229, 11232) an amendment to the bill which provided that—

> Investigations to assist the President in ascertaining differences in costs of production under this section shall be made by the United States Tariff Commission, and no proclamation shall be issued under this section until such investigation shall have been made.

While several Senators had said that hearings would be necessary before new rates were established by the President (62 Cong. Rec., pt. 6, p. 5885, pt. 11, pp. 11155, 11156) the committee made no move towards placing such a provision in the bill until August 11, when it proposed (62 Cong. Rec., pt. 11, p. 11229) to insert in the act the words:

> The commission is authorized to hold such hearings and to adopt such procedure, rules, and regulations as it deems necessary for adequate investigation under this section; and it shall give such opportunity as it deems necessary or proper for the presentation of material facts in each case and arguments thereon. The commission shall prepare its findings in the case of each proceeding under this section, and the President shall make such findings public as soon as practicable after the issuance of a proclamation under the provisions of this section.

In the Senate this provision was amended (62 Cong. Rec., pt. 11, pp. 11231, 11232) to read:

> The commission shall give reasonable public notice and shall give reasonable opportunity to parties interested to be present and to produce evidence and to be heard. Said hearings shall be public. Subject to the foregoing, the commission is authorized to adopt such reasonable procedure, rules, and regulations as it may deem necessary. The commission shall prepare its findings in

> the case of each proceeding under this section, and the President shall make such findings public as soon as practicable after the issuance of a proclamation under the provisions of this section.

This provision was changed in conference (62 Cong. Rec., pt. 12, p. 12627) to read as it stands in the 1922 law. The entire paragraph in section 315 (c) of the law as enacted is as follows:

> Investigations to assist the President in ascertaining differences in costs of production under this section shall be made by the United States Tariff Commission, and no proclamation shall be issued under this section until such investigation shall have been made. The commission shall give reasonable public notice of its hearings and shall give reasonable opportunity to parties interested to be present, to produce evidence, and to be heard. The commission is authorized to adopt such reasonable procedure, rules, and regulations as it may deem necessary.

The managers on the part of the House reported (62 Cong. Rec., pt. 12, p. 12660):

> The action of the conferees eliminates the provision of the Senate amendment that the Tariff Commission hearings shall be public and that the President shall make the findings, hearings, and testimony in all proceedings public as soon as practicable after the issuance of a proclamation.

Senator Underwood, in criticizing the action of the conferees, said (62 Cong. Rec., pt. 12, p. 12888):

> When the bill passed the Senate of the United States . . . it provided that the investigation should be in the open light of day. . . . But when the bill went to conference, in the secret caucus of the majority party, those provisions of the bill which required investigation in the open by the Tariff Commission were stricken out. We are now told that they are to investigate, but they can do so behind closed doors.

Thus Congress when it enacted the law in accordance with the conference report did not intend that there should be a judicial inquiry, but clearly contemplated that the Commission should acquire information not only by hearing parties who desired to be heard but through its own investigations as well, just as Congressional committees, Congress itself and the Tariff Commission had always done. So it was that Congress struck from the Senate amendment the provisions under which all testimony would have been made public.

Read in consonance with the history and purpose of the law the words "reasonable opportunity * * * to be heard" may not be said to contemplate a judicial hearing at which all the evidence before the Commission shall be made of record for the examination of "parties interested." If these words are not thus broadly construed as importing a judicial hearing with all its incidents, including

the right to cross-examine all witnesses and to examine all proofs which are to be or have been considered by the Commission in its investigation, they must be given a reasonable construction which is in consonance with the history and purpose of the law. The apparent purpose of Congress may only be accomplished by regarding the "hearings" as supplementary to the "investigation" and like legislative hearings designed to afford an opportunity for those who may be affected by a change of tariff to appear, produce evidence and be heard in argument. "To be heard" does not in this statute mean more than just that. To construe the words more broadly would distort the process of scientific investigation in aid of the President, defeat the purpose of the statute, and destroy its usefulness.

The petitioner's brief (p. 28, see also p. 54) quotes with approval an assertion that the right granted by the 1922 law to parties interested to be present, to produce evidence, and to be heard—

> was conceded to adverse interests to protect them against the abuses of ex parte hearings and proceedings and against ex parte statements and evidence which if made known to those opposing a change of rate, might be discredited, controverted or refuted.

But no proof is advanced in support of that assertion, and the history of the section shows that Congress did not intend that the entire investigation should be made in public. By the Revenue Act of

September 8, 1916 (c. 463, sec. 706, 39 Stat. 756, 797; U. S. C., Title 19, sec. 100, quoted in Appendix A, p. 35), the Commission had been given access to the private books and records of American manufacturers and the right to make copies therefrom, and these provisions had been reinforced by sec. 318 (f) of the Tariff Act of September 21, 1922. (42 Stat. 858, 947, quoted in Appendix A, p. 36.) Obviously the ex parte investigations were to be continued and in providing that parties interested should be given reasonable opportunity to produce evidence and to be heard Congress could hardly have intended that they should have access to all the information obtained from private books and records. It fully satifies the sense and the purpose of the statute to say that they were to be given reasonable opportunity to present evidence and argument in order to supplement the investigation theretofore conducted by the Commission rather than to review it.

A real review of that investigation would not be complete unless parties interested were allowed to see the documentary evidence itself, including the books of original entry of their competitors. The right to such an inspection of books would not be confined to the books of a producer on whose request the Commission instituted the investigation. It would apply to all producers within the country whose statistics had been considered by the Commission. Indeed, if the petitioner's contention is

sound, any importer could petition for a reduction of rates and, if given the aid of the Tariff Commission, could throw open to the world the books of producers of such commodities throughout the United States. Congress obviously did not grant to parties interested any right to make such a review of an investigation by the Commission.

The petitioner's brief also relies upon a dictum by the Court of Appeals of the District of Columbia that the Commission must furnish to parties interested all data submitted to it which did not fall within a narrow definition of trade secrets and processes, and says (p. 32) that—

> Thereafter, in 1930, Congress in re-enacting the flexible tariff with many changes expressly re-enacted the provision thereof construed by the court in said case essentially in *haec verba,* thereby legislatively approving the construction thereof by said court.

The petitioner's brief shows that the Commission has not followed the dictum upon which the petitioner relies. (P. 66.) Congress knew when it enacted the 1930 law that the Commission had not followed that dictum. (See discussion in 71 Cong. Rec., pt. 4, pp. 4563–4570.) And efforts made in Congress to give to other persons access to confidential information in the files of the Commission have failed. An amendment proposed in the Senate which would have had that effect (see discussion just cited) did not pass Congress, and the bill set forth in the petitioner's brief

(p. 70) which might have placed such information at the disposal of a "consumers' counsel" did not become law. (75 Cong. Rec., pt. 9, 10035.) It can not be said that later Congressional action supports the petitioner's construction of the Tariff Act of 1922.

IV

COMPARISON WITH OTHER STATUTORY PROVISIONS DOES NOT SUPPORT THE CONTENTION THAT SECTION 315 REQUIRED THE COMMISSION TO REVEAL DATA WHICH HAD BEEN SUBMITTED TO IT AS CONFIDENTIAL

The petitioner relies upon sections of the Interstate Commerce Act and decisions thereunder to define what is meant by a hearing; but those sections and decisions have no application here. The sections relating to hearings before that commission are worded differently and have an entirely different background. They were framed on the theory that in passing upon the rights of individual carriers the commission should act judicially and conduct its hearings accordingly. But section 315 of the Act of 1922 dealt with the establishment of rates of duty which applied alike to all importers and as to which Congress had unlimited power of taxation. In such a case no importer or manufacturer had any right to a judicial or quasi-judicial investigation.

A similar contrast is afforded in the Tariff Act of 1922 itself. When dealing with the application of existing tariff rates to individual importers

Congress ordained procedural provisions which it did not put into the section which dealt with the establishment of new rates of tariff applicable to all who might thereafter import the commodity involved. Section 501 (42 Stat. at 966, U. S. C., Title 19, sec. 381), which dealt with appeals by importers from the decision of the appraiser to the Board of General Appraisers, provided that the General Appraiser who considered the appeal—

> shall give reasonable notice to the importer and to the person designated to represent the Government in such proceedings of the time and place of the hearing, at which the parties and their attorneys shall have an opportunity to introduce evidence and to hear and cross-examine the witnesses of the other party and to inspect all samples and all papers admitted or offered as evidence. * * *

But for this express provision the importer would have no right to cross-examine witnesses and inspect evidence. That was the rule under the Revised Statutes, which contained no such express provision. *Auffmordt* v. *Hedden,* 137 U. S. 310. In *Origet* v. *Hedden,* 155 U. S. 228, 238, the Court said that "if the importer is afforded such notice and hearing as enables him to give his views and make his contention in respect to the value of his goods, he can not complain." The absence from section 315, relating to hearings before the Tariff Commission, and the presence in section 501, re-

lating to hearings before the Board of General Appraisers, of express provisions allowing cross-examination of witnesses and inspection of all evidence produced show that Congress did not intend that the hearings before the Tariff Commission under section 315 should have all the features of judicial or quasi-judicial proceedings, but that, on the contrary, it intended that those hearings should be similar to the customary hearings before legislative committees.

V

NO STATUTE, EXECUTIVE ORDER, OR REGULATION OF THE COMMISSION REQUIRED IT TO DISCLOSE THE INFORMATION WHICH WAS HERE TREATED AS CONFIDENTIAL

The Revenue Act of September 8, 1916, c. 463, sec. 708, 39 Stat. 756, 798, U. S. C., Title 19, sec. 105, made it unlawful for any member of the Commission or any other officer or employee of the United States to divulge in any manner not provided for by law the trade secrets or processes of any person or organization embraced in any examination or investigation conducted by the Commission or by its order. The Commission has always treated this provision as binding upon the Commission as well as upon its members and has not published the costs of production in such manner as to divulge the operations of individual manufacturers. (See, *e. g.*, Tariff Information Series No. 6, 1917, p. 11; No. 18, 1919, p. 76; No. 22, 1919, pp.

14, 16, 19, 32, 92; Hearings of Subcommittee of Senate Judiciary Committee, 67th Cong., 2d sess., March 17, 1922, p. 616; 71 Cong. Rec., pt. 4, pp. 4563–4570, Oct. 15, 1929.) Of course, where there were many producers, as in the instance cited in the petitioner's brief (p. 67) costs might be published by substituting numbers in lieu of names. In the present case only two companies appear to have been producing sodium nitrite in the United States. (R. 171.) In the Commission's Report or Summary (R. 163) all information in regard to costs of manufacture of individual firms, which domestic manufacturers regarded as "trade secrets" within the meaning of section 708 of the Revenue Act of 1916, were eliminated. (R. 164, 171, 172.)

But while the Commission relied upon the provisions of the Act of 1916 it is not necessary to consider whether the act would have been violated if the Commission had divulged the costs of individual producers. That act did not require the publication of all of the information which was placed at the disposal of the Commission; and it certainly did not require the publication of data which had been submitted under a promise that individual costs would not be revealed.

The Executive Order of President Harding (R. 63) simply provided that investigations—

> shall be in accordance with law and the public interest, under rules and regulations to be prescribed by such Commission.

The rules of the Commission (R. 63–67) did not suggest that parties interested had any right to cross-examine witnesses. Those parties had simply (R. 65) the right—

> to offer such relevant testimony, both oral and written, as the Commission may deem necessary for a full presentation of the facts involved in such investigation.

The Commission had its own substitute for cross-examination, a substitute which was better adapted to the purposes of its investigations than proceedings judicial in form could possibly be. In accordance with its rules (R. 65; see also Act of September 8, 1916, c. 463, sec. 706, 39 Stat. 756, 797, U. S. C., Title 19, sec. 100, quoted in Appendix A, p. 35.)

> Evidence, written or oral, submitted in hearings shall upon order of the Commission be subject to verification from the books, papers, and records of parties in interest. Such further investigation may be had as the Commission shall order.

The only rule which offers any shadow of support to the contention that the petitioner was entitled to knowledge of the data which was refused is the rule (R. 67) which allowed parties to examine the report of the commissioner or investigator in charge of the investigation and also the record except such portions as related to trade secrets and processes. The only question is whether the Commission could give to the words

"trade secrets and processes" the meaning which it gave to them in the present investigation.

Undoubtedly the Commission could have adopted a rule which provided specifically that the costs of individual producers should be treated as strictly confidential, for such a rule would have been within the statutes and the Executive Order. Or the Commission could have stated prospectively that "trade secrets" should not be divulged and that the term "trade secrets," as used by it, included individual costs of production. Or, as the Commission's rules "are subject to amendment and modification at the discretion of the Commission" (Sixth Annual Report, 1922, p. 3), it could even adopt an interpretation of an existing rule which extended that rule, and such an interpretation would be valid unless it impaired rights which had already accrued. In the present case the only rights which had accrued were those of the companies which had furnished information as to costs to the Commission with the claim (R. 172) which the Commission conceded (R. 164) that such information must be regarded as a trade secret.

Therefore, regardless of the meaning which courts may give to the phrase "trade secrets or processes" when construing the Revenue Act of 1916, it seems clear that the rules of the Commission, as understood by those who had framed them and who could change them at any time, did not

require the divulging of facts which were here treated as confidential. Such an interpretation of its own rules would be binding upon the courts.

It is obvious that in some lines of industry, as where many manufacturers are engaged in producing the same article in the same way, there is no reason for secrecy as to methods or costs of production. It is equally obvious that where a new industry is being built up, where the two or three manufacturers of an article are truly pioneers, the methods and costs of production are naturally regarded as secrets which the individual manufacturers are unwilling to divulge to their competitors directly and are unwilling to divulge to the Government unless the data are to be held strictly confidential. The Tariff Commission has met these situations by assuring manufacturers that it will not divulge trade processes nor individual costs of production. In taking this position as to costs of production it has gone further than is always necessary. But surely when the Commission is making an investigation it may say to all who are concerned that it will not make public or disclose to competitors business information which is considered confidential and could not otherwise be obtained. Such information is secret and to narrowly construe the statute as applying only to secret processes is to defeat the fair and just purpose of the law.

In such a case as the present one the costs per unit of labor and of the materials which were actually used in the plant of the American Nitrogen Products Company might be matters of common knowledge, and yet a disclosure of the amounts of money paid out for labor and for the different materials used by that concern might give to a shrewd and eager competitor important clews to the processes used by this American company. Even if the Commission divulged only a part of the cost of an individual manufacturer it might inadvertently publish to the world information concerning trade processes the full significance of which was not realized by the Commission and the publication of which would seriously injure the American producer. The only safe course for the Commission to follow was to lay down the broad rule that it would not publish individual costs of production. Only in that way could it secure the confidence and the cheerful cooperation of the business enterprises which it was investigating. Only in that way could the Commission successfully perform its duties under the Tariff Act. Congress declared that changes in rates should be made in order to equalize costs of production at home and abroad; but American producers would hardly dare to appeal to the Commission for aid if in order to secure it they were obliged to expose their business secrets to their competitors at home and abroad.

CONCLUSION

The decision of the Court of Customs and Patent Appeals should be affirmed.

Respectfully submitted.

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DECEMBER, 1932.

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APPENDIX A

STATUTES INVOLVED

The Revenue Act of September 8, 1916, c. 463, secs. 706–708, 39 Stat. 756, 797, 798, provided:

> SEC. 706. That for the purposes of carrying this title into effect the commission or its duly authorized agent or agents shall have access to and the right to copy any document, paper, or record, pertinent to the subject matter under investigation, in the possession of any person, firm, copartnership, corporation, or association engaged in the production, importation, or distribution of any article under investigation, and shall have power to summon witnesses, take testimony, administer oaths, and to require any person, firm, copartnership, corporation, or association to produce books or papers relating to any matter pertaining to such investigation. Any member of the commission may sign subpœnas, and members and agents of the commission, when authorized by the commission, may administer oaths and affirmations, examine witnesses, take testimony, and receive evidence.
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> * * * * *
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> SEC. 707. That the said commission shall in appropriate matters act in conjunction and cooperation with the Treasury Department, the Department of Commerce, the Federal Trade Commission, or any other departments, or independent establishments of the Government, and such departments and

independent establishments of the Government shall cooperate fully with the commission for the purposes of aiding and assisting in its work, and, when directed by the President, shall furnish to the commission, on its request, all records, papers, and information in their possession relating to any of the subjects of investigation by said commission and shall detail, from time to time, such officials and employees to said commission as he may direct.

SEC. 708. It shall be unlawful for any member of the United States Tariff Commission, or for any employee, agent, or clerk of said commission, or any other officer or employee of the United States, to divulge, or to make known in any manner whatever not provided for by law, to any person, the trade secrets or processes of any person, firm, copartnership, corporation, or association embraced in any examination or investigation conducted by said commission, or by order of said commission, or by order of any member thereof. * * *

The Tariff Act of September 21, 1922, c. 356, sec. 318 (f), 42 Stat. 858, 946, provided:

The second paragraph of section 706 of the Revenue Act of 1916 is amended to read as follows:

"Such attendance of witnesses and the production of such documentary evidence may be required from any place in the United States at any designated place of hearing. And in case of disobedience to a subpœna the commission may invoke the aid of any district or territorial court of the United States or the Supreme Court of the District of Columbia in requiring the attendance and testimony of witnesses and the

production of documentary evidence, and such court within the jurisdiction of which such inquiry is carried on may, in case of contumacy or refusal to obey a subpœna issued to any corporation or other person, issue an order requiring such corporation or other person to appear before the commission, or to produce documentary evidence if so ordered or to give evidence touching the matter in question; and any failure to obey such order of the court may be punished by such court as a contempt thereof."

The Tariff Act of September 21, 1922, c. 356, sec. 315, 42 Stat. 858, 941–943, provided:

(a) That in order to regulate the foreign commerce of the United States and to put into force and effect the policy of the Congress by this Act intended, whenever the President, upon investigation of the differences in costs of production of articles wholly or in part the growth or product of the United States and of like or similar articles wholly or in part the growth or product of competing foreign countries, shall find it thereby shown that the duties fixed in this Act do not equalize the said differences in costs of production in the United States and the principal competing country he shall, by such investigation, ascertain said differences and determine and proclaim the changes in classifications or increases or decreases in any rate of duty provided in this Act shown by said ascertained differences in such costs of production necessary to equalize the same. Thirty days after the date of such proclamation or proclamations such changes in classification shall take effect, and such increased or decreased duties shall be levied, collected, and paid on such

articles when imported from any foreign country into the United States or into any of its possessions (except the Philippine Islands, the Virgin Islands, and the islands of Guam and Tutuila): *Provided*, That the total increase or decrease of such rates of duty shall not exceed 50 per centum of the rates specified in Title I of this Act, or in any amendatory Act.

(b) That in order to regulate the foreign commerce of the United States and to put into force and effect the policy of the Congress by this Act intended, whenever the President, upon investigation of the differences in cost of production of articles provided for in Title I of this Act, wholly or in part the growth or product of the United States and of like or similar articles wholly or in part the growth or product of competing foreign countries, shall find it thereby shown that the duties prescribed in this Act do not equalize said differences, and shall further find it thereby shown that the said differences in cost of production in the United States and the principal competing country can not be equalized by proceeding under the provisions of subdivision (a) of this section, he shall make such findings public, together with a description of the articles to which they apply, in such detail as may be necessary for the guidance of appraising officers. In such cases and upon the proclamation by the President becoming effective the ad valorem duty or duty based in whole or in part upon the value of the imported article in the country of exportation shall thereafter be based upon the American selling price, as defined in subdivision (f) of section 402 of this Act, of any similar competitive article manufactured or produced in the United

States embraced within the class or kind of imported articles upon which the President has made a proclamation under subdivision (b) of this section.

The ad valorem rate or rates of duty based upon such American selling price shall be the rate found, upon said investigation by the President, to be shown by the said differences in costs of production necessary to equalize such differences, but no such rate shall be decreased more than 50 per centum of the rate specified in Title I of this Act upon such articles, nor shall any such rate be increased. Such rate or rates of duty shall become effective fifteen days after the date of the said proclamation of the President, whereupon the duties so estimated and provided shall be levied, collected, and paid on such articles when imported from any foreign country into the United States or into any of its possessions (except the Philippine Islands, the Virgin Islands, and the islands of Guam and Tutuila). If there is any imported article within the class or kind of articles, upon which the President has made public a finding, for which there is no similar competitive article manufactured or produced in the United States, the value of such imported article shall be determined under the provisions of paragraphs (1), (2), and (3) of subdivision (a) of section 402 of this Act.

(c) That in ascertaining the differences in costs of production, under the provisions of subdivisions (a) and (b) of this section, the President, in so far as he finds it practicable, shall take into consideration (1) the differences in conditions in production, including wages, costs of material, and other items in costs of production of such or simi-

lar articles in the United States and in competing foreign countries; (2) the differences in the wholesale selling prices of domestic and foreign articles in the principal markets of the United States; (3) advantages granted to a foreign producer by a foreign government, or by a person, partnership, corporation, or association in a foreign country; and (4) any other advantages or disadvantages in competition.

Investigations to assist the President in ascertaining differences in costs of production under this section shall be made by the United States Tariff Commission, and no proclamation shall be issued under this section until such investigation shall have been made. The commission shall give reasonable public notice of its hearings and shall give reasonable opportunity to parties interested to be present, to produce evidence, and to be heard. The commission is authorized to adopt such reasonable procedure, rules, and regulations as it may deem necessary.

* * * * *

(e) The President is authorized to make all needful rules and regulations for carrying out the provisions of this section.

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APPENDIX B

ANSWER OF UNITED STATES TARIFF COMMISSION

The following extract from the record in *United States ex rel. Norwegian Nitrogen Products Co., Inc.*, v. *United States Tariff Commission et al.*, in this Court, 1926 Term, No. 91, pp. 50–70, sets forth the answer which the Tariff Commission and its members filed in the Supreme Court of the District of Columbia on January 4, 1924, in response to a petition on relation of the Norwegian company for a writ of mandamus.

> The United States Tariff Commission and Thomas O. Marvin, William S. Culbertson, David J. Lewis, Edward P. Costigan, William Burgess and Henry H. Glassie, the Commissioners constituting the United States Tariff Commission, answering, say:
>
> 1. Respondents, upon information and belief, admit that the relator, Norwegian Nitrogen Products Company, is a corporation organized and existing under the laws of the State of New York and is engaged in the business of importing sodium nitrite for sale in the United States. But respondents, upon information and belief, aver that relator is not engaged in the general business of importing sodium nitrite as such, but is the exclusive agent, selling on commission, of a certain Norwegian corporation engaged in the business of manufacturing and producing sodium nitrite for exportation to and sale within the United States; and that, in respect of the proceedings before the United

States Tariff Commission mentioned in its petition for mandamus, the relator was, and is, acting for and on behalf of such Norwegian manufacturer.

2. Respondents admit that the United States Tariff Commission is a public body created by and existing under the statutes of the United States; that the individual respondents, Marvin, Culbertson, Lewis, Burgess, Costigan and Glassie, are severally the six Commissioners constituting said Commission, said Commissioners, for the purpose of the discharge of their official duties, being located at the seat of government within the District of Columbia; and that the principal office of such Commission is in the District of Columbia.

3. Respondents admit that the power, authority, and duties of the said Tariff Commission, and the several Commissioners composing the same, are prescribed, declared and defined by the provisions of Title VII of the Revenue Act of 1916 and by the provisions of the Tariff Act of 1922 mentioned in Relator's petition; but for greater certainty beg leave to refer to the text of said statute.

4. Respondents admit that, in pursuance of the authority vested in him by the Tariff Act of 1922, the President, on October 7, 1922, promulgated an Executive Order in words and figures as set forth in said petition.

5. Respondents admit that, on October 20, 1922, the said Commission promulgated certain Rules of Procedure, among which are the provisions mentioned in Relator's petition, but for greater certainty crave leave to refer to the text of the said Rules, a true copy whereof is annexed to this Answer,

marked Exhibit I, and prayed to be read as a part hereof.

6. Respondents admit that, on October 30, 1922, the American Nitrogen Products Company, a corporation under the laws of the State of Washington, having its principal office at Seattle in said State by its President and General Manager, C. F. Graff, filed with the United States Tariff Commission an application (called by relator a petition and brief) praying for an increase in the rate of duty imposed by the Tariff Act of 1922 upon imported sodium nitrite from the rate of three cents per pound, as provided in said act, to a rate of four and one-half cents per pound, being the maximum increase of fifty per centum in addition to the rate of duty imposed by said act.

7. Respondents admit that thereafter, having duly considered and inquired into the subject matter mentioned in said application, the United States Tariff Commission, on the 27th day of March, 1923, passed an order whereby it instituted an investigation of the differences in foreign and domestic costs of production of sodium nitrite. Said order is in words and figures as follows:

"*Investigation No. 7 by the United States Tariff Commission for the Purposes of Section 315 of the Tariff Act of 1922*

SODIUM NITRITE

"The United States Tariff Commission on this 27th day of March, 1923, for the purpose of assisting the President in the exercise of the powers vested in him by Section 315 of Title III of the Tariff Act of 1922 and under the powers granted by law and pursu-

ant to the rules and regulations of the Commission, hereby orders an investigation of the differences in costs of production of, and of all other facts and conditions enumerated in said Section with respect to, the articles described in Paragraph 83 of Title I of said Tariff Act, namely: Sodium Nitrite, being wholly or in part the growth or product of the United States, and of and with respect to like or similar articles wholly or in part the growth or products of competing foreign countries.

"Ordered further, that all parties interested shall be given an opportunity to be present, to produce evidence, and to be heard at a public hearing in said investigation to be held at the office of the Commission in Washington, D. C, or at such other place or places as the Commission may designate, on a date hereafter to be fixed, of which said public hearing at least thirty days' public notice shall be given by publication once each week for two successive weeks in 'Treasury Decisions' published by the Department of the Treasury, and in 'Commerce Reports' published by the Department of Commerce, copies of which said publications are obtainable from the Superintendent of Documents of the Government Printing Office in Washington, D. C.

"And ordered further, that public notice of said investigation shall be given by posting a copy of this order for thirty days at the principal office of the Commission in the City of Washington, D. C., and at the office of the Commission at the port of New York, and by publishing a copy of this order once a week for two successive weeks in said 'Treasury Decisions' and in said 'Commerce Reports.'"

8. Respondents, denying that it or they ordered or instituted such investigation upon the allegations of said application, say that the United States Tariff Commission, having conducted said investigation in the field in accordance with the provisions of the statutes creating, as well as prescribing, defining and declaring the duties of the United States Tariff Commission made, issued and published the order giving notice of the public hearing to be held in such investigation in the words and figures as set forth in realtor's petition.

9. Respondents admit that, subsequent to July 20, 1923, and prior to September 20, 1923, the relator, Norwegian Nitrogen Products Company, entered its appearance in said proceedings by counsel and then and thereafter made request of said Commission for a copy of the aforesaid application (called petition and brief) of said American Nitrogen Products Company. But respondents deny that the grounds and reasons upon which the United States Tariff Commission ordered said investigation to be made and the proceedings therein to be had, are set out in the said application or petition. On the contrary, respondents say that the action of said Commission in ordering said investigation for the purposes of said Section 315, was not taken in response to, nor was the same based upon or grounded upon, the allegations set out in said application or petition, which was treated in the same manner as other applications are treated by the said Commission, namely, as in the nature of a suggestion only, the provisions of said Section 315 being applied in the public interest and for general public purposes, and not at the suit of private parties in their own private in-

terest. Respondents aver that the action taken by said Commission in instituting said investigation was taken upon the official judgement and determination and responsibility of the persons composing the said Commission in pursuance of their official duties, and after due inquiry, not only into the matters alleged in said application, but also into all other available information and data respecting the advisability or inadvisability, in the public interest, of instituting an investigation into the differences of costs of production of sodium nitrite in the United States and in the principal competing foreign countries, for the purpose of assisting the President in the application of the provisions of Section 315 of the Tariff Act of 1922.

10. Respondents admit that the application (called petition and brief) of said American Nitrogen Products Company was, at the times mentioned, and is now, in the custody of the United States Tariff Commission. But respondents deny that said application is a public record. On the contrary, they aver that said petition or application is in the nature of a suggestion only, drawing the attention of the Commission as in other cases to a supposed condition of nonequalization between the existing customs duty and the differences between foreign and domestic costs of production with a view to Presidential action under the provisions of Section 315 of the Tariff Act of 1922; that the allegations in said application, as in other similar applications, were made under the protection and sanction of Section 708 of the Revenue Act of 1916, as will hereinafter be more fully shown, and are in respect of all statements concerning methods and cost of pro-

duction, including material costs, costs of power, labor costs, and other items of cost, of the person, firm, or corporation filing the application, essentially confidential and privileged, and entitled to the protection of said Section 708. Respondents further aver that no private right exists, as a matter of course, to the institution of an investigation looking to a change in any rate of customs duty, nor is the United States Tariff Commission bound, by reason of any such application or the allegations therein, whether made under oath or not, to expend the public money or devote the public time to investigations upon the subject matter mentioned therein. Nor is the Commission bound to disclose such allegations to parties claiming to be interested in the increase, decrease or maintenance of the existing rates of duty on the article mentioned in said application. But respondents aver, that the action of said Commission must be, and is, determined upon considerations of public interest and upon examination of such information as may be available, statistical or otherwise, relevant to the subject matter, and indicating, in the judgment and discretion of said Commission, the advisability or inadvisability of ordering in the public interest an investigation for the purpose of said Section 315. Respondents further aver that, when such an investigation is instituted in the exercise of the Commission's power and authority, the allegations or statements in any application made by any particular individual or corporation in relation to said subject matter, and particularly any statements concerning applicant's methods or costs of production, are of no lawful concern to any other person or persons claiming to be interested in the sub-

ject matter of said investigation, whether as a manufacturer, producer, buyer, seller, purchaser, importer or otherwise.

11. Respondents aver that long subsequent to the filing of said application of the American Nitrogen Products Company and also subsequent to the issuance of the order of March 27, 1923, instituting said investigation (which was not entered upon said application), said Commission sent certain of its special experts, being officers of the United States acting under the sanction of their respective official oaths, to visit and inspect all plants in the United States producing sodium nitrite, including the plants and offices of the American Nitrogen Products Company, and also to visit and inspect all plants known to be producing sodium nitrite in the principal competing foreign countries manufacturing that article. But respondents deny that said Tariff Commission, or its officers, experts, agents or investigators received and accepted from the said American Nitrogen Products Company, *ex parte* and secret information respecting the costs of producing sodium nitrite by said company and in said foreign countries, or that any such information was received in support of allegations made by said American Nitrogen Products Company. On the contrary, respondents aver that all information and cost data obtained from the said American Nitrogen Products Company were obtained in the same manner as from the other companies producing sodium nitrite in the United States and according to the usual practice in such cases in the performance and discharge of official duties. All such data were obtained from the regular and ordinary books of account of the said Company by

official experts specially trained, skilled and experienced in that work, and in pursuance of the regular and usual course of procedure pursued under the statutes by the United States Tariff Commission in all investigations conducted by it for the purposes of Section 315 of said Tariff Act of 1922.

12. In further answer to the allegations of this section of relator's petition and the Rule to Show Cause issued thereon, these respondents further say:

(*a*) That the United States Tariff Commission was created and established by the provisions of Title VII of the Revenue Act of 1918; that in and by the provisions of said Title the general powers and functions of said Commission in respect of the administration, operation and industrial relations and effects of the customs duties of the United States and the conditions, causes and effects relating to competition of foreign industries with those of the United States were declared and established; and in and by the provisions of said Title it was provided that, for the purpose of carrying said Title into effect, the Commission or its duly authorized agent or agents should have access to and the right to copy any document, paper or record, pertinent to the subject matter under investigation, in the possession of any person, firm, copartnership, corporation or association engaged in the production, importation or distribution of any article under investigation, and should have power to summon witnesses, take testimony, administer oaths, and to require any person, firm, copartnership, corporation, or association to produce books or papers relating to any matter pertaining to such investigation, all of which investigational

powers are made subject, as will hereinafter more fully appear, to the condition that it should be unlawful to divulge or make known in any manner whatever, not provided for by law, the trade secrets or processes of any person, firm, copartnership, corporation, or association embraced in any examination of investigation conducted by said Commission.

(*b*) That, in and by Section 315 of the Tariff Act of 1922, it is provided that, in order to regulate the foreign commerce of the United States and to put into force and effect the policy of the Congress by said Act intended, the President shall have power, upon investigation to be made by the United States Tariff Commission, to ascertain the differences in costs of production of domestic articles and of like or similar articles produced in foreign countries and to proclaim the changes in classification and increases and decreases in rates of tariff duty which may be necessary to equalize the differences in costs thus ascertained.

(*c*) That in and by subsection (*c*) of said Section 315 it is further provided that, in ascertaining differences in costs of production under the provisions of said section, the President, in so far as he finds it practicable, shall take into consideration (1) the differences in conditions in production, including wages, costs of material, and other items in costs of production of such or similar articles in the United States and in competing foreign countries; (2) the differences in the wholesale selling prices of domestic and foreign articles in the principal markets of the United States; (3) advantages granted to a foreign producer by a foreign government,

or by a person, partnership, corporation, or association in a foreign country; and (4) any other advantages or disadvantages in competition.

(*d*) That, in and by said Section 315, it is provided that investigations to assist the President in ascertaining difference in costs of production under said section shall be made by the United States Tariff Commission and no proclamation shall be issued by the President until such investigation shall have been made.

(*e*) That, in making such investigation to assist the President in the exercise of said powers under Section 315 of the Tariff Act of 1922, the Tariff Commission is vested by the provisions of Title VII of the Revenue Act of 1916, supplemented by the provisions of the Tariff Act of 1922, with the power, and is under the necessity, of obtaining as far as practicable, the individual costs of production of the several persons, partnerships, firms, corporations or associations producing the article constituting the subject matter of said investigation and must take said individual production costs. as far as practicable, directly from the ordinary private books of account of individuals, firms, and corporations, wherein have been recorded, in the usual course of business, all expenditures by said manufacturers for and on account of the immense variety of separate items constituting, and going to make up, the costs of production of such articles; that such inquiry involves taking from said books of account the amount of capital invested by said persons in their said manufacturing plants; the amount of interest, if any, paid upon loans secured for the purpose of manufacture; the amounts paid in

each particular purchase for the several species or kinds of materials entering into said manufacture; the amounts respectively paid the several kinds and classes of employees or workmen engaged in said manufacture; the salaries paid to the several officers and employees of said manufacture; the amounts paid the persons employed for expert technical, chemical, research or other scientific and laboratory assistance in such manufacture. Such inquiry further includes the total gross sales of the articles in question and an ascertainment of the direct labor cost, material cost, and overhead cost per unit of the articles produced by each of said domestic manufacturers who are necessarily in competition not only with the foreign, but also with other domestic producers of the same article. It further includes the amounts paid both in detail and in general and by particular units for the selling or marketing expense incurred in placing said article and each unit thereof on the markets for said product.

(*f*) That by section 708 of the Revenue Act of 1916, it is provided:

It shall be unlawful for any member of the United States Tariff Commission, or for any employee, agent or clerk of said commission, or any other officer or employee of the United States, to divulge, or to make known in any manner whatever not provided for by law, to any person, the trade secrets or processes of any person, firm, copartnership, corporation or association embraced in any examination or investigation conducted by said commission, or by order of said commission, or by order of any member thereof. Any offense against the provisions of this section shall be a misdemeanor and be punished by

a fine not exceeding $1,000, or by imprisonment not exceeding one year, or both, in the discretion of the court, and such offender shall also be dismissed from office or discharged from employment. The commission shall have power to investigate the Paris Economy Pact and similar organizations and arrangements in Europe.

(*g*) That the several items of individual costs necessary to be taken from the books of each producer and analyzed and collated as in sub-section (*c*) set out, are in their nature trade secrets of the several persons, firms, co-partnerships, corporations or associations embraced in said examination and investigations; that the disclosure of said items by the Tariff Commission would constitute a direct injury and legal wrong to every such person, firm, co-partnership, corporation or association, inasmuch as it would disclose to his, its or their several competitors the precise elements, trade secrets and processes which constitute its particular advantage or disadvantage in competition, and would thereby permit unlawful and irreparable injury to private property of great value.

13. Further answering, respondents say that, pursuant to the statutes and in conformity with the practice described in the preceding paragraph, the United States Tariff Commission, having instituted the investigation by the order of March 27, 1923, proceeded in said investigation as follows:

(*a*) Special experts in the service of the Commission, being officers of the United States, acting under the sanction of their several official oaths and in the course of their official duty, were dispatched to the plants of the three companies known to be

producing sodium nitrite in the United States,—namely, the American Nitrogen Products Company, located at Le Grande, Washington; the Semet-Solway Company, located at Syracuse, New York; and the Harshaw-Fuller-Goodwin Company, located at Cleveland, Ohio,—for the purpose of obtaining from the original books of entry of said companies all data required for the ascertainment of the cost of production of sodium nitrite in their respective plants. Said special experts accordingly obtained from each of the said companies, upon cost schedules framed in accordance with accepted accounting practice, the data on their books respecting the actual costs of production of the quantities of the sodium nitrite produced therein, that is to say, the quantity and cost of the several materials used in the manufacture of sodium nitrite by the particular process employed in each factory, as well as the total costs of such materials; the cost of direct labor, skilled, semi-skilled, and unskilled, in the conversion of such materials into the finished product, including such labor cost in respect of each successive stage in such conversion; the details of factory expense involved, including labor and material used in repairs, supplies, power, light and heat and overhead; all amounts disbursed for general expense, including administrative salaries, office expense, research and laboratory and other expenses; fixed charges including depreciation, taxes, both Federal and State and local, insurance, rent where actually paid, interest paid on bonds and short-time loans and other forms of borrowed capital used in the business and the capital actually invested in plant and equipment; selling expense, whether in the

form of commissions paid to agents and distributors, or by direct disbursements; total production capacity of the plant; the amount of the gross sales of all products manufactured by each of said companies, including sodium nitrite, and the amount of the total gross sales of sodium nitrite; the average number of wage earners employed, the average wage rates for each class of labor employed; the principal markets for the finished product, and the average price received for sodium nitrite by each of said companies for the years 1920 and 1921; the yield of sodium nitrite per pound of the particular material principally used in each plant as indicative of the degree of efficiency of plant operation.

(*b*) The production-cost data described in the preceding subparagraph (*a*) and required by the Commission under the authority of section 708, Title VII, Revenue Act of September 8, 1916, supplemented by the Tariff Act of 1922, were furnished by each of the three companies aforesaid and access to and the right to copy all and any documents, papers or records of said companies pertinent to the subject-matter of said investigation, was accorded as required by said Section 708 of said Title VII, upon the conditions and under the sanctions established by Section 708 of said Title making it unlawful to divulge to any person in any manner not provided by law, the trade secrets or processes of any person, firm, co-partnership or association embraced in such examination or investigation. And respondents say that the information and access thus obtained by this Commission was furnished by said companies, including the American Nitrogen Products Company, upon the faith of said

statute and upon the consequent understanding, recited in the forms and schedules of the Commission, that the costs of individual persons, firms, or corporations would be held strictly confidential and were for the exclusive use of the Commission and would be published only in such manner as would not divulge the operations of individual manufacturers.

(*c*) Special experts in the service of the Commission, being officers of the United States, acting under the sanction of their several official oaths and in the course of their official duty, were dispatched to Norway (which is the principal competing country in the production of sodium nitrite), for the purpose of obtaining from the books of original entry all data required for the ascertainment of the cost of production of sodium nitrite, and data were sought to be obtained in like manner as in the United States from the offices of the Norsk Hydro-Elektrik-Kvaelstofaktieselskab (Norwegian Hydro-Electric Nitrogen Corporation), located at Kristiania, Norway, the sole company manufacturing sodium nitrite in Norway. Direct access to the books of said corporation, although duly requested, was refused by said corporation, and inasmuch as the United States Tariff Commission was without power to enforce obedience in Norway to its said request, no information or cost data were obtained directly from said manufacturer, though said special experts of the Tariff Commission were permitted to go through the plant of said corporation. Said special experts, however, did obtain, from other sources of a public nature, information relating to power costs in the production of sodium nitrite, prices of soda ash, wage rates,

and other factors entering into the production costs, from which information, combined with published reports and other information respecting the operations of said Norwegian company, an estimate for use in its summary of information hereinafter referred to was made of the cost of production of sodium nitrite in Norway.

(*d*) Special experts of this Commission, being officers of the United States acting under the sanction of their several official oaths and in the course of their official duties, were also dispatched to Germany, another competing country in the production of sodium nitrite, and cost of production data similar to that hereinbefore described were sought to be obtained in the same manner from the offices of the Badische-Anilin und Soda Fabrik Co., located at Berlin, Germany, but access to the books of said company was refused and the experts of the Commission were unable to obtain any further information with respect to the costs of production of sodium nitrite in Germany except data as to wholesale prices at the factory of this company with transportation rates upon said article.

(*e*) In conformity with the established practice of the Commission, the cost of production data obtained as described were collated and tabulated at the office of the Commission and subjected to analysis and the results of the information gathered by the Commission in such investigation were summarized in a written report or Summary of Information, excluding therefrom only the summary of or report upon such portions of such information as related to trade secrets or processes; and such Report or Summary was made public and furnished to each of

the parties in interest appearing in such investigation, including the relator, Norwegian Nitrogen Products Company, during the course of the public hearing in such investigation which, as hereinbefore stated, had been ordered for September 10, 1923, and public notice whereof had been duly published in accordance with the rules of the Commission. In said Report or Summary no figures were given as to production costs of sodium nitrite in the United States for the reason first, that the individual costs of production of the several plants could not be stated without directly revealing the trade secrets of said producing companies in violation of the provisions of said Section 708, and second, that on account of the limited number of companies producing said article, said production costs could not be stated in the form of averages without revealing in substance and effect the individual production costs and thereby divulging the trade secrets and processes of said producing companies.

14. Respondents are advised and believe, and therefore aver, that for the United States Tariff Commission, or for any member, employee, officer, or agent thereof, to divulge or to make known in any manner whatever, to the Norwegian Nitrogen Products Company, its officers, counsel or agents, or to any other person, the individual costs of production of the American Nitrogen Products Company, would be an offense against the provisions of Section 708 and a misdemeanor punishable by a fine not exceeding $1,000, or by imprisonment not exceeding one year, or both, in the discretion of the court, and would further involve the dismissal from office of the six respondents con-

stituting the United States Tariff Commission.

15. Respondents further say, that on September 10, 1923, in accordance with public notice theretofore issued and published, a public hearing in said investigation was held at the office of the Commission in the City of Washington.

(*a*) At said hearing the relator, Norwegian Nitrogen Products Company, appeared by counsel and was accorded an opportunity to be present, to produce any evidence it had to produce, and to be heard fully and at length upon the questions involved in said investigation; was accorded an opportunity to cross examine, and relator by its counsel did cross examine the only witness appearing in said investigation, namely, C. F. Graff, President and General Manager of the American Nitrogen Products Company, interrogating by its counsel said witness at length concerning the accuracy of statements contained in the application of the American Nitrogen Products Company with regard to the profit earned in the production of sodium nitrite, the outstanding capital stock of the company, preferred and common, the extent to which said capital stock was paid in, what it represented, what assets were behind it, its present value, and the facts and circumstances respecting a certain alleged suit brought by the minority stockholders of said company, and in general what relator's counsel described as the "financial background of said company"; and further concerning the sale or disposition of a certain plant formerly owned by said company at Lake Bunsen in British Columbia, the ownership of the common stock of a certain Nitro Development Company, the terms, provisions and

conditions of an alleged contract between the American Nitrogen Products Company, Nitro Development Company, Graff Construction Company, and C. F. Graff and E. L. Blaine, concerning the construction work of the American Nitrogen Products Company's plant, the commission allowed to the second company on account of said contract, and other matters of detail with regard to said contracts, but without having called on the American Nitrogen Company for the production of said contract and without having given any notice for that purpose and without any offer to submit or produce the papers at the hearing. Relator was permitted to examine the witness with respect to the American Nitrogen Products Company's existing contracts, the last sales made, the prices at which the same was sold, and also with respect to the difference between modes of manufacture in Norway and in the United States. Witness stated that the data submitted to the Commission showed that only the actual investment in the La Grande plant, and not the amount of capital stock issued, had been taken into account in connection with the production costs of the American Nitrogen Products Company.

The witness stated that he was willing to give and did give the cost of investment of the American Nitrogen Products Company's plant at La Grande as included in their figures or costs of production, and the labor employed there, and did state approximately the investment in said plant and the depreciation thereon, but declined to go into the cost of labor, the cost of power, and the cost of material, all of which witness claimed to be competitive information theretofore furnished the Commission, but information

which they did not care to disclose in open hearing to their competitors. And this Commission declined to direct said witness to disclose said information in open session.

(*b*) At said session of September 10, 1923, the relator by its counsel made a formal request to be supplied with a full and complete copy of the application of the American Nitrogen Products Company without eliminating therefrom any matter, whether deemed by the Tariff Commission to be trade secrets or not. Pending the consideration of this request and the determination as to what portions of the statements made by the American Nitrogen Products Company the Commission would permit relator to examine, relator's counsel stated that they had no testimony to submit.

The hearing was thereupon adjourned to September 26, 1923.

16. Respondents further say that, after the adjournment of the hearing of September 10, 1923, and before the opening of the adjourned session on September 26, 1923, the Commission furnished all parties appearing in said investigation, including relator, with a Report or Summary of Information in which were stated the results of the examination and investigation made by the Commission's special experts, including an estimate of the cost of production of sodium nitrite in Norway, indicating that the average invoice value was 4.84 cents per pound c. i. f. New York. Included in this price are the following charges:

	Per 100 pounds
Packing	$0.204
Inland freight	.026
Ocean freight and insurance	.273
Total	0.503

Deducting these charges, said estimate tended to show that the average price received at the factory in Norway was 4.34 cents per pound.

17. At said adjourned hearing on September 26, 1923, relator, by its counsel, again appeared and stated that he had received said Summary, that he had transmitted to Norway a cable summarizing the statement of estimated costs of production in Norway, showing 4.34 cents per pound at factory as Norwegian cost of production, and requesting the Norwegian company to telegraph instructions for the hearing on September 26; that in reply relator's counsel had received a cable stating, in substance, that the Tariff Commission's estimate was completely erroneous; that the cost of production by far surpassed their estimate; that on principle the Norwegian company always refused to publish cost figures and consequently did not furnish the Commission's investigators any information enabling them to calculate cost prices; that said company strongly protested investigators' competence; that the letter from relator's counsel, dated September 9, had been received and that no time had existed to study the same but that perusal permitted them to state that several Graff statements regarding the company and processes were incorrect.

Upon attention of relator's counsel being drawn to the fact that the Commission had been accorded no opportunity to get information from his clients, relator's counsel stated as follows:

"No, sir. As I read the statute, our client, being an interested party, has a right to be present, to produce evidence, if he wants, or not, and to be heard, without submitting him-

self to the jurisdiction of this Commission for examination, and without submitting to this Commission, in consideration of his statutory rights, any evidence of others or of himself. We understand that the statute accords our client certain rights, to be present and to be heard, and to produce evidence without any consideration therefor, and the statute does not exact, as I have stated before, as a condition precedent, that before we can enjoy these statutory rights we must submit any evidence as to any of our processes, any of our costs, or any other data."

Relator's counsel thereupon requested an extension of thirty days. Being asked whether, if any extension of time was permitted, the Commission would receive from him the figures of cost production in Norway, relator's counsel answered, in substance, that he would not make any promise in that regard. It was thereupon drawn to his attention that, inasmuch as the cable from Norway declined to give the information the Commission desired, no information of the kind could be obtained in any length of time, to which relator's counsel replied:

"The Commission is asking us to produce the cost of production in our own factory. That is not all the evidence of the cost of production of sodium nitrite in Norway. I may go further and say that the cost of production in the factory of the Norwegian Products Company might be found by this Commission not to be the fair cost of production, or the cost of production in Norway."

Said relator's counsel further stated:

"The question is, what is the cost of production in the United States, and not what is the cost of production in Mr. Graff's factory in Seattle. Upon these subjects we are

ready to offer proof, and to do so it is not necessary for us to exhibit to this Commission the costs of production in our own factory."

Relator's counsel renewed his request for additional time in which to examine and produce evidence of foreign costs of sodium nitrite, and in disputation of the Commission's Report or Summary, submitted on September 15, 1923, stating that, although the Norway producers had refused to disclose their costs of production to the Commission, they insisted upon additional time, after the matter had been discussed in public hearing, for the purpose of producing evidence of a general nature on costs of production in Norway; and that relator relied strictly upon the statute. The Commission thereupon ruled that, inasmuch as the Norway producer, knowing that the principal issue at the hearing was the differences between American costs of production and Norwegian costs of production, including their costs of production, had refused the Commission access to their books and declined to give the required information, counsel had had ample time to prepare a statement of costs of production of his Norway clients and meet the issue at the Hearing, the Commission declined to adjourn the Hearing beyond October 6, 1923.

Thereupon relator, by its counsel, made the following formal requests:

I want to make formal request, as an interested party appearing in this case, that we have all evidence which has been offered in this case, not deemed by the Commission trade secrets, or not, in fact, trade secrets or processes. That is request No. 1.

We want to make the further request that the Commission afford us the same rights to

inspect, and to offer in evidence in disputation thereof, if we see fit, and to be fully heard upon, all the evidence in the possession of the Commission, as to the cost of power in the United States in the production of nitrite.

Third, the same request as to the number of laborers employed, and the wages paid in the American Nitrogen Products testimony submitted before the Commission.

Fourth, the same request as to all capital invested in the American Nitrogen Products Company plant in the State of Washington.

Fifth, referring to the summary of information in the matter of sodium nitrite, the subject of a public hearing September 10, 1923, that we have opportunity to cross-examine the experts of this Commission who gathered this testimony, as to the testimony which they have submitted to the Commission, and that we have the right to offer such testimony as we may see fit and reasonable opportunity to be heard thereupon.

The Commission thereupon took said requests under consideration and stated that the Commission's decision in writing would be sent to the counsel by October 4 and also announced at the adjourned Hearing on October 6.

(*e*) On October 2, 1923, this Commission transmitted to the relator's counsel, a certified copy of the Commission's Minutes showing the ruling upon the foregoing requests made by the relator's counsel on September 26, 1923. These rulings were announced by the Commission at the adjourned Public Hearing resumed on October 6, 1923, and are in words and figures as follows:

"1. The Commission, in addition to holding a public hearing in which Judge De Vries participated as counsel for the parties

of record represented by him, has submitted to the parties appearing at such hearing a written statement embodying the result of the Commission's field investigation. At the adjourned hearing, set for October 6, 1923, all parties interested, including those represented by Judge De Vries, will have an opportunity to meet the matter embodied in such statement. In so far as the first request of Judge De Vries is a request for leave to inspect the original and primary data collected by the Commission's investigators in the field and embodied in such statement, or is a request for additional information respecting the same beyond what the Commission has already submitted, the request is denied."

"2. At the adjourned public hearing, set for October 6, 1923, opportunity will be afforded all parties interested to offer any evidence they may have with respect to the matter embodied in the Commission's statement of the field investigations conducted by its staff and such parties will have opportunity to be heard upon the same. In so far as the second request of Judge De Vries is a request to offer evidence and to be heard upon the question of the cost of power in the United States for the production of nitrites and to offer evidence and to be heard in respect of the matter embodied in the statement submitted by the Commission to the parties, the request is granted. In so far as it is a request to inspect the original cost and other data collected in the field by the Commission's investigators or the figures showing the details of individual costs of production obtained by the Commission under the sanction of Section 708 of Title VII of the Revenue Act of September 8, 1916, the request is denied.

"3. At the adjourned hearing set for October 6, 1923, all parties interested will be afforded an opportunity to offer any relevant and material evidence in their possession with respect to the number of laborers employed and the wages paid by the American Nitrogen Products Company. To this extent the third request of Judge De Vries is granted; but in so far as that request asks for inspection of the original data showing the production costs in respect of labor of the American Nitrogen Products Company submitted by or obtained from said company under the sanction of Section 708 of Title VII of the Revenue Act of September 8, 1916, the request is denied.

"4. At the adjourned hearing set for October 6, 1923, all parties interested will be afforded an opportunity to offer any relevant and material evidence in their possession with respect to capital invested in the American Nitrogen Products Company. To this extent the fourth request of Judge De Vries is granted; but in so far as that request asks for inspection of the original data relating to the production of the American Nitrogen Products Company submitted by or obtained from said company under the sanction of Section 708 of Title VII of the Revenue Act of September 8, 1916, the request is denied.

"5. The fifth request of Judge De Vries, in so far as it asks for an opportunity to cross-examine experts of the Commission with respect to the costs data and other matter obtained by them in the course of the investigation in the field, is denied. But at the adjourned hearing set for October 6, 1923, all parties interested will be afforded an opportunity to offer any relevant and material evidence in their possession, and to be

heard, with respect to the matter embodied in the Commission's statement heretofore submitted to the parties interested appearing in such investigation. In so far as the fifth request of Judge De Vries is a request for an opportunity to meet, by evidence and argument, the matter embodied in such statement, the request is granted. In so far as it is a request to cross-examine the Commission's investigators concerned in obtaining the matter summarized in said statement with respect to the performance of their official duties and functions in such investigation, and in so far as it is a request for inspection of the cost data and other matter so obtained and embodied in said statement, said request is denied."

(*f*) Respondents further say that, although at the sessions of the Public Hearing held respectively on September 10, September 26, and October 6, 1923, it was announced by the Chairman that the principal matter in question was the difference between production costs in the United States and production costs in Norway, and although every reasonable opportunity was accorded relator's counsel to present evidence, either openly or in confidence on that question, and although relator's counsel was expressly asked whether he expected to offer any testimony through witnesses, said counsel replied in the negative, and stated that all information which he would offer the Commission would be printed as a part of his brief; that it would not be sworn testimony but would be in the form of telegrams, cables, and answers to them, and copies of official documents; and that such matter was submitted by relator's counsel as information having probative force in determining the action

of the Commission, subject, if doubted, to investigation for the purposes of verification.

(*g*) Respondents further say that on the ninth day of October, 1923, relator submitted and filed with this Commission in the said Investigation, a printed brief of 93 pages wherein, in addition to argument upon the law of the case and upon the facts shown at the Hearings and in the Summary and Report furnished interested parties by the Commission, relator, submitted a mass of documentary evidence respecting the value of the La Grande plant of the American Nitrogen Products Company, the cost of power at said plant, and the estimated cost of production of sodium nitrite in this country and in Norway based upon a comparison of the cost of electrical energy consumed per ton of sodium nitrite produced, and the cost of raw materials and labor entering therein. In the exhibits to said brief, relator submitted and filed with the Commission printed copies of the following: (1) an amended complaint filed in the Superior Court of the State of Washington for King County, by T. Gladding and other alleged creditors, against the American Nitrogen Products Company, praying, among other things, for the appointment of a permanent Receiver to take possession and control of the property and assets of said company, (2) a motion for intervention in said suit by certain persons describing themselves as holders of preferred stock of the said American Nitrogen Products Company, and a complaint in intervention filed by said parties, (3) an affidavit of one Christian Tjosovoig claiming to be owner of certain shares of certain preferred stock of said company, (4) an order of dismissal of said action entered in said Superior Court

on June 14, 1923, following an alleged agreement entered into by the American Nitrogen Products Company of the first part, the Nitro-Development Company of the second part, and the stockholders of the Nitro-Development Company, parties of the third part, and C. F. Graff and E. L. Blaine as parties of the fourth part, and (5) a balance sheet of the said American Nitrogen Products Company as of June 30, 1919; all of which said documents were submitted by the relator, as shown by said brief, upon the questions of the cost of the plant of said American Nitrogen Products Company, the value of its total possible output, the financial and legal status of that company "as an instrumentality for the upbuilding of the nitrite production in the United States," and the question whether there were rights vested in other parties and corporations having a fixed charge upon the American Nitrogen Products Company in the course of any development thereof "which will render expansion possible for the purpose of the upbuilding and economic production of sodium nitrite in the United States."

18. But respondents aver that neither in its said brief, nor otherwise, did the Norwegian Nitrogen Products Company at any time submit to the United States Tariff Commission, under the sanction of section 708 of Title VII of the Revenue Act of 1916, or in any other manner, any facts, information or data respecting the cost of production of sodium nitrite in the plant of its own company, or its affiliated or associated company, or principal, to wit, the Norsk Hydro-Elektrik Kvaelstofaktieselskab, which as respondents are informed and believe, and therefore aver is the sole Norwegian producer of sodium nitrite in Norway.

19. Respondents deny that the purpose of the Hearings ordered by said Commission in said investigation was to ascertain, define or determine whether or not the allegations in the application of the American Nitrogen Products Company were true in point of fact, or whether said allegations as to costs of production in the plant of said Products Company and in the United States and in said foreign countries, supported the contention or claim of said company that nitrite could not be produced in its plant or in the United States for sale in the United States, or that the differences between the cost of production of sodium nitrite in the United States and in the principal competing foreign country could not be equalized, unless the duty thereon was increased 50 per centum; or whether such allegations supported any contention or claim of the said American Nitrogen Products Company whatever. On the contrary, respondents say that the said Hearings in said Investigation were held pursuant to statute in order to give all parties interested a reasonable opportunity to be present, to offer evidence, and to be heard upon the subject matter of such investigation as instituted by the Commission for the purpose of assisting the President in the determination of the facts necessary to be ascertained for the application, in the general public interest, of section 315 of the Tariff Act of 1922.

20. Respondents deny that the allegations in the petition or application of the American Nitrogen Products Company constituted the proper or only subjects of the Hearing ordered by said Commission, or the subject of said Hearing in any sense whatsoever, or that knowledge of the allegations of said application or petition of the American Ni-

trogen Products Company as to its costs of production was or is in any manner indispensable, prerequisite and essential to the conduct of said public hearings, or any of them, or to the right of the relator to be present, to produce evidence or to be heard thereat or to present arguments upon the subject of said investigation, or to enter into or effectively to participate in any of said Hearings.

21. Respondents are unable either to admit or to deny that relator has a vital or any interest in the subject of said Investigation, or that an increase in duty from 3 cents to 4½ cents per pound, if proclaimed by the President under the law, would constitute an impediment, injury or hindrance to relator's business or would reduce relator's profit upon the sale of sodium nitrite. But respondents are advised and therefore aver that relator's allegations in that regard are irrelevant and immaterial and require no answer inasmuch as the purpose of said Investigation and of the Public Hearings held therein, is to ascertain, for the assistance of the President, and pursuant to law, the true differences between foreign and domestic costs of production, and not the supposed effect of any action predicted thereon upon the private interests of any individual.

22. Respondents further deny that relator had or has a legal right to examine and take a complete copy of the application of said American Nitrogen Products Company (which respondents again affirm was not the subject of said investigation), or of the allegations therein respecting the costs of producing sodium nitrite by said American Nitrogen Products Company; or that knowledge of such information was or is necessary

for the protection of the rights of said relator or to enable said relator to enter upon such Hearings and to offer evidence tending to disprove the allegations or claims of said American Nitrogen Products Company.

Respondents further deny that said Hearings were ordered for the benefit of, or upon the petition of the said American Nitrogen Products Company or of C. F. Graff, President and General Manager thereof, but affirm that the said Hearings were ordered as hereinbefore stated. Respondents are advised and believe and therefore aver that the filing of said petition or application by said American Nitrogen Products Company, praying for investigation of the matters therein mentioned, does not make said application of the matters therein contained a public record or in any wise constitute a waiver of lawful right to have said application, in so far as the same includes trade secrets or processes, withheld from the knowledge of the relator or of any other person, firm, copartnership or association claiming to have an interest in said investigation.

23. Answering generally relator's said petition, respondents say (*a*) that the relator, the Norwegian Nitrogen Products Company, and all parties interested in the subject matter of said investigation of the difference of costs of production of sodium nitrite, were given due, timely, and reasonable notice of the institution of such investigation and of the time and place at which the Public Hearing therein would be held; and were accorded reasonable opportunity to be present, to produce evidence, and to be heard at such Hearings; (*b*) that during the course of said Hearings as aforesaid and with reasonable

opportunity to consider and meet the same, a Report or Summary of all information and data relevant to said inquiry obtained by said Commission or in the possession of the Commission, not in the judgment of the Commission protected under said section 708 of Title VII as trade secrets or processes, was made known to the parties interested and appearing at said hearings, including relator; (*c*) that this Commission, and the Commissioners constituting the same, in the exercise of the powers or duties conferred upon them by law, are vested with power and authority to consider and determine whether information secured by said Commission in the course of an examination or an investigation is or is not in respect of said investigation a trade secret or process of the person, firm, copartnership, corporation or association supplying the same; (*d*) that their determination, in the course of and for the purposes of, any investigation conducted by the Commission, that any such information is a trade secret is final and conclusive and is not subject to be reexamined, reviewed, or set aside in this honorable Court, and more especially not by way of collateral attack or review; (*e*) that to permit such matter to be produced for reexamination and review would of itself constitute a publication and communication of the matter constituting such trade secrets and processes in violation of said statute in such case made and provided; (*f*) that the relator, having appeared and submitted to the jurisdiction of said United States Tariff Commission, and having formally requested inspection of said original and primary data collected by the Commission's investigators and the original cost and other data collected by the Commission's investigators and the original cost and

other data collected by the Commission showing the production costs of domestic manufacturers of sodium nitrite, and its motion in that behalf having been duly heard, considered and decided by said Commission, such decision made in the exercise of the quasi-judicial power and authority conferred upon it by statute, is also not to be reexamined or reviewed, or set aside in this honorable Court, and more especially not by way of collateral attack or review on a writ of mandamus; (*g*) that, inasmuch as relator submitted itself to the jurisdiction of said Commission and moved for an opportunity to cross-examine certain experts of the Commission with respect to cost data and other information obtained by them in their investigation and in the files of the Commission, and inasmuch as such motion had been overruled by the Commission, such decision is also not to be reexamined or reviewed in this Court, and more especially not by way of collateral attack.

And respondents say that for the purposes of said Investigation the determination of all said matters, involving questions of fact and of mixed law and fact, and the application of the law to the fact, has been committed to the United States Tariff Commission by the statutes in such case made and provided, and therefore can not be made the object of judicial inquiry upon a petition for a writ of mandamus or otherwise, and the determinations of said Commission are not subject to be reversed or overruled or set aside in this honorable Court, nor can said Commission be commanded to proceed or act contrary to its said determination.

24. The respondents further say that the said Investigation of the difference of costs of production of sodium nitrite in the United

States and in the principal competing foreign countries instituted for the purpose of assisting the President, is still pending in said United States Tariff Commission, undetermined and undisposed of, and that no report upon said Investigation has been transmitted to the President, nor have any recommendations respecting the same been submitted to the President. Respondents are advised, believe, and accordingly aver that relator's present proceeding is therefore premature and without warrant, inasmuch as no legal right of said relator in the premises, if any it has, has been infringed or affected and inasmuch as relator, if entitled to any remedy, has a full, plain, and adequate remedy by proceedings against the enforcement of any Presidential proclamation altering or adjusting the rates of duty on sodium nitrite after the same has been made by the President and before the expiration of the 30 days intervening between the date of such proclamation and the date when the same can be put into operation.

Respondents say that any matter or thing in said petition contained and not hereinbefore well and sufficiently admitted, traversed, confessed and avoided or denied, is not true to the best of their knowledge and belief, and the same is hereby denied.

Wherefore, having fully set forth the facts constituting the grounds and reasons for the action of the United States Tariff Commission complained of in said petition for mandamus, together with the grounds of its refusal to disclose to relator the individual costs of production and other trade secrets of the said American Nitrogen Products Company, which said petition for mandamus prays that respondents be compelled

to disclose, these respondents pray to be hence dismissed.

UNITED STATES TARIFF COMMISSION,
(Signed) By THOMAS O. MARVIN,
Chairman.
(Signed) THOMAS O. MARVIN,
Commissioner.
(Signed) WILLIAM S. CULBERTSON,
(Signed) DAVID J. LEWIS,
(Signed) EDWARD P. COSTIGAN,
(Signed) WILLIAM BURGESS,
(Signed) HENRY H. GLASSIE,
Commissioners.
(Signed) PEYTON GORDAN,
Attorney of the United States in and for the District of Columbia.
(Signed) HENRY H. GLASSIE,
(Signed) WILLIAM S. CULBERTSON,
Of Counsel.

DISTRICT OF COLUMBIA, *ss:*

We, Thomas O. Marvin, William S. Culbertson, David J. Lewis, Edward P. Costigan, William Burgess, and Henry H. Glassie, being first duly sworn according to law, on oath depose and say that we have read the foregoing answer by us subscribed and know the contents thereof; and that the matters and things therein stated as of our own personal knowledge are true, and those stated as upon information and belief we believe to be true.

(Signed) THOMAS O. MARVIN.
(Signed) WILLIAM S. CULBERTSON.
(Signed) DAVID J. LEWIS.
(Signed) EDWARD P. COSTIGAN.
(Signed) WILLIAM BURGESS.
(Signed) HENRY H. GLASSIE.

Subscribed and sworn to before me this 4th day of January, A. D. 1924.

(Signed) JOHN F. BETHUNE,
[SEAL.] *Notary Public.*

APPENDIX C

IN THE SUPREME COURT OF THE DISTRICT OF COLUMBIA

Memorandum opinion filed April 18, 1924

On submission after hearing on petitioner's demurrer to respondent's answer.

This is a proceeding for a writ of mandamus to be issued against the respondents requiring them to permit the relator to—

> Examine the petition of the American Nitrogen Products Company and all data, information, and evidentiary matter on file with the Commission respecting the cost of producing sodium nitrite at the plant of said American Nitrogen Products Company or elsewhere in the United States, and in foreign countries, and to show cause, if any they have, why a public hearing should not be granted, at which the said relator and any other person, firm or corporation having an interest in the subject-matter, appearing therein shall have the right and opportunity to cross-examine investigators, experts, agents and witnesses who may have supplied any such data, information or evidentiary matter, to offer evidence in contravention of any such data, information and evidentiary matter, to be heard thereupon and to present arguments and representations against said petition, the allegations therein contained, and any conclusions which may be made therefrom, and against the probative and legal value of any and all data, information and evidentiary matter relating to the sub-

ject of said hearings on file with the Commission, upon which the said American Nitrogen Products Company prays that said Commissioners, respondents herein, recommend to the President that the duty of three (3) cents per pound on the importation of sodium nitrite, as presently fixed by law, be increased to four and one-half ($4\frac{1}{2}$) cents per pound, under the provisions of the Tariff Act of 1922.

From the pleadings it appears that the relator is a corporation organized and existing under the laws of the State of New York, engaged in the business of importing sodium nitrite for sale within the United States, but according to the respondents' answer, upon information and belief in this respect, the relator is not in the general business of importing sodium nitrite as such, but is the exclusive agent, selling on commission, of a certain Norwegian corporation engaged in the business of manufacturing and producing sodium nitrite for exportation to and sale within the United States, and in the proceeding before the respondent Commission hereinafter referred to, the relator was and is acting for and on behalf of such Norwegian manufacturer.

The importance of the case was asserted by counsel for the respective parties in the arguments at the bar. The exhaustive character of those arguments, the ability with which they were made, and the case itself, would warrant this court in fully setting forth the grounds and reasons for the conclusion reached, but the importance to both the relator and the respondents of an early disposition of the litigation, at least so far as this court is concerned, and the exactions of manifold judicial

duties pressing upon the court, necessitate a comparatively brief statement of the reasons for its conclusion.

The controversy presented by this proceeding arises out of an investigation undertaken by the respondent Commission, of the differences of costs of production and of other facts and conditions enumerated in Section 315 of title 3 of the Tariff Act of 1922, with respect to sodium nitrite, wholly or in part the growth or product of the United States, and of and with respect to this substance, wholly or in part the growth or product of competing countries. The investigation was stimulated or suggested by a petition filed on October 24, 1922, by the American Nitrogen Products Company of Seattle, Washington, in which it sought an increase of the duty upon imported sodium nitrite from three cents per pound, as prescribed by the Tariff Act of 1922, to 4½ cents per pound. On July 20, 1923, the respondent Commission by an order adopted as of that date, gave notice of a public hearing, to be held on September 10, 1923,

> at which all persons interested will be given an opportunity to be present to produce evidence, and to be heard with regard to the differences in cost of production, etc.,

of sodium nitrite.

Before the date of the hearing so fixed by the respondent Commission, the relator herein, by its counsel, appeared in the proceeding or investigation thus instituted by the Commission, and requested a copy of the petition filed by the American Nitrogen Products Company. This was furnished, with certain deletions made by the Commission, and at the public hearing so ordered, and after it had

begun, the questions raised by the pleadings in the pending case, were presented, and the respondent Commission ruled on them at an adjournment of the hearing, the adjourned hearing taking place on October 6, 1923. These rulings appear on pages 66 et seq. of the printed petition herein. From an inspection of these rulings it will be observed that the Commission refused the application made by the petitioner for leave to its counsel to inspect certain data collected by the Commission, as well as certain data submitted to the Commission by the American Nitrogen Products Company, and the data thus furnished is the data that the relator seeks to obtain access to by the writ of mandamus.

It is to be noted in passing that a domestic manufacturer is seeking to obtain an increase in the tariff duty on sodium nitrite, and the relator is an American corporation engaged in the business of *importing* this product for sale within the United States. It is therefore engaged in competing, in the United States, with domestic manufacturers of the same product.

The respondent Commission was created by the Revenue Act of September 8, 1916, and its principal duties are set forth in sections 702–703, and 704 of the said Act. By Section 702 it is provided that it shall be the duty of the Commission

> to investigate the administration and fiscal and industrial effects of the customs laws of this country now in force or which may be hereafter enacted, the relations between the rates of duty on raw materials and finished or partly finished products, the effects of ad valorem and specific duties and of compound specific and ad valorem duties, all questions relative to the arrangement of schedules and classification of articles in the several sched-

> ules of the customs law, and, in general, to investigate the operation of customs laws, including their relation to the Federal revenues, their effect upon the industries and labor of the country, and to submit reports of its investigations as hereafter provided.

By section 703 it is, *inter alia,* provided

> That the commission shall put at the disposal of the President of the United States, the Committee on Ways and Means of the House of Representatives, and the Committee on Finance of the Senate, whenever requested, all information at its command, and shall make such investigations and reports as may be requested by the President or by either of said committees or by either branch of the Congress.

By the Tariff Act of September 21, 1922, and by subsection (*a*) of Section 315 thereof it was enacted

> That in order to regulate the foreign commerce of the United States and to put into force and effect the policy of the Congress by this Act intended, whenever the President, upon investigation of the differences in costs of production of articles wholly or in part the growth or product of the United States and of like or similar articles wholly or in part the growth or product of competing foreign countries, shall find it thereby shown that the duties fixed in this Act do not equalize the said differences in cost of production in the United States and the principal competing country he shall, by such investigation, ascertain said differences and determine and proclaim the changes in classifications or increases or decreases in any rate of duty provided in this Act shown by said ascertained differences in such costs of production necessary to equalize the same.

and by subsection "c" of said Section 315, it is prescribed, *inter alia*,

> That in ascertaining the *differences in costs* of production, under the provisions of subdivisions (*a*) and (*b*) of this section, the President, in so far as he finds it practicable, shall take into consideration (1) the differences in conditions in production, including wages, costs of material, and other items in costs of production of such or similar articles in the United States and in competing foreign countries; (2) the differences in the wholesale selling prices of domestic and foreign articles in the principal markets of the United States; (3) advantages granted to a foreign producer by a foreign government, or by a person, partnership, corporation, or association in a foreign country; and (4) any other advantages or disadvantages in competition.
>
> Investigations to assist the President in ascertaining differences in costs of production under this section shall be made by the United States Tariff Commission, and no proclamation shall be issued under this section until such investigation shall have been made.
>
> The commission shall give reasonable public notice of its hearings and *shall give reasonable opportunity to parties interested to be present, to produce evidence, and to be heard.*
>
> The commission is authorized to adopt such reasonable procedure, rules, and regulations as it may deem necessary. (Italics ours.)

While there are other provisions of law that it would be useful to quote, and which must be considered in the disposition of the case, neither time

nor space permits this to be done. For present purposes it is enough to point out that the Tariff Commission is exclusively an investigating and fact-finding body, the results of whose investigations are primarily intended for the information and use of the President, Committees of Congress, and of Congress itself, and particularly, in carrying out the policy of Congress as it finds expression in the Tariff Act of September 21, 1922, it is an aid to the President in securing information that he should possess in order to exercise the important power and authority, somewhat legislative in its character, conferred upon him by section 315 of the Tariff Act last mentioned. And, while it is true that it is on occasions required to hold public hearings, to give parties interested a right to be heard, and to present evidence relating to the subject matter of its investigations, it is a serious question whether these requirements of the statute change, or are intended to change the essential character of the Commission as an investigating and fact-finding body, and while parties interested are by terms of the applicable statutes entitled to be heard and to present evidence, it would, it seems, be going too far to say that interested parties appearing in such investigations, and whose interests may conflict on questions as to whether a given tariff duty should be increased or reduced, stand in the position of litigating parties, entitled to invoke Constitutional rights and safeguards applicable wherever it can be said that a question of due process of law is involved. Of course domestic manufacturers of products who encounter the competition in the United States of foreign manufacturers, their agents and representatives in this country, and

citizens of the United States engaged in the business of importing and selling within the United States, the same product, are interested parties, with respect to Tariff duties laid thereon, but neither have any property right, in the usual sense of that term, in an existing tariff duty, with reference to which they are at all times subject to the will of Congress, who may prescribe a duty, modify a duty already prescribed, or remove it altogether and thereby place such product on what is sometimes called the free list. *Bragg* v. *U. S.*, 2 Court of Customs Appeals, 22, 23, 24. *Buttfield* v. *Stranahan*, 192 U. S. 470, 492, 493.

The respondents resisted the demands of the relator in this case, upon the main grounds that to afford the relator access to the data demanded by them, would be to violate assurances given by them to those who supplied them with confidential information regarding their business, and would also reveal trade secrets.

The protection of trade secrets or processes has been something that the Courts of the country have generally safeguarded, and have enjoined those who would reveal them. So late as February 18th of this year, the Supreme Court, through Mr. Justice Holmes, delivered an opinion in the case of *United States ex rel Saint Louis Southwestern Railroad Co.* v. *The Interstate Commerce Commission, et al.*, No. 398, October term, 1923. In that case it appeared that the Interstate Commerce Commission had made a tentative valuation of the relator's property and had served it with a copy of the valuation. The relator protested the valuation, and thereupon the Commission ordered a hearing upon the subject. Before the hearing took

place the relator filed a motion with the Commission praying for an order

> allowing it to examine the underlying data upon which the valuation was based and for a subpœna duces tecum to named officers of the Commission directing them to bring with them to the hearing all the data in any way relating to the matter in issue.

The Commission thereupon canceled the hearing and made an order in which, *inter alia,* it denied inspection of "cost information secured from others than the carrier in question." Thereupon the relator presented its petition for a writ of mandamus to this Court, which petition was dismissed, and the case finally reached the Supreme Court. In the course of its opinion that Court declared that

> if Congress had given no hearing before the Commission but still had made its conclusions *prima facie* evidence of value, it would be hard to say that any Constitutional rights of the railroads had been infringed.

The Court considered the statute under which the Interstate Commerce Commission was acting, and referring to provisions of the statute prescribing a hearing before the Commission, declared that

> the hearing to be sure is not of the ordinary kind. The railroads have no adversary. The Commission of course has no object except to arrive at the truth. It is not to be cross-examined for bias or otherwise as to its capacity to decide or modes of deciding what is entrusted to it, but on the other hand since it must grant a hearing manifest justice requires that the railroads should know the facts that the Commission supposes to be established and we presume that it would desire the grounds of its tentative valuation

> to be subjected to searching tests. But there are necessary limits. While there can be no public policy or relation of confidence that should prevail against the paramount claim of the roads the work of the Commission must go on, and can not be stopped as it would be if many of the railroads concerned undertook an examination of all of its papers to see what they could find out.

It is to be observed that this case involved property of the relator railroad, a valuation of which, when made final, would be *prima facie* evidence in various judicial proceedings in which the value of the property is material to the disposition of the case.

In the instant case the investigation undertaken by the Tariff Commission, is for the purpose of providing the President with information which would aid him in determining whether an existing Tariff duty should be altered.

In two later cases, decided together on March 17, 1924, those of the *Federal Trade Commission* v. *The American Tobacco Company,* and the same *Commission* v. *P. Lorillard Company, Incorporated,* Nos. 206 and 207, October term, 1923, the Supreme Court had before it petitions for writ of mandamus brought by the Federal Trade Commission against the defendants in order to require them to produce certain records, contracts, memoranda, and correspondence for inspection and making copies. The petitions were denied by the District Court and in the course of its opinion, also delivered by Mr. Justice Holmes, the Court declared:

> Anyone who respects the spirit as well as the letter of the Fourth Amendment would be loath to believe that Congress intended to

> authorize one of its subordinate agencies to sweep all our traditions into the fire (*Interstate Commerce Commission* v. *Brimson*, 154 U. S. 447, 479), and to direct fishing expeditions into private papers on the possibility that they may disclose evidence of crime. We do not discuss the question whether it could do so if it tried, as nothing short of the most explicit language would induce us to attribute to Congress that intent. The interruption of business, the *possible revelation of trade secrets*, and the expense that compliance with the Commission's wholesale demand would cause are the least considerations. It is contrary to the first principles of justice to allow a search through all the respondent's records, relevant or irrelevant, in the hope that something will turn up. The unwillingness of this Court to sustain such a claim is shown in *Harriman* v. *Interstate Commerce Commission*, 211 U. S. 407, and as to correspondence, even in the case of a common carrier, in *United States* v. *Louisville & Nashville R. R. Co.*, 236 U. S. 318, 335. (Italics ours.)

It is noted that in these cases the situation was rather the reverse of what is presented in the case at bar. There the Federal Trade Commission was desiring to secure access to the records of the companies engaged in the manufacture and sale of tobacco, and the Commission proceeded, as it conceived it had a right to proceed, under the Act of September 26, 1914, and in pursuance of a resolution of the Senate passed August 29, 1921, the resolution directing the Commission to investigate the tobacco situation as to domestic and export trade with particular reference to market prices to producers, and the Act under which it proceeded, directs the Commission to prevent the use of unfair

methods of competition in commerce and authorizes it, and in a proper case, to order desistence of the use of prohibitive methods. In the instant case we have the Tariff Commission obtaining information and data in confidence, and which information and data involves, it is claimed by respondent Commission, trade secrets, if not trade processes, as well, and the Commission is doing this for the purpose of supplying the President with information upon which he might act in altering a tariff duty.

It is not asserted that the cases thus referred to are decisive of the pending one, but they certainly point to underlying principles which have their application here, and perhaps for even stronger reasons than those involved in the first case cited.

The relator claims in the broadest form, the right, which it insists is given to it by the law under which the respondent Commission operates, to have an opportunity to examine

> every particle of evidence gathered by the Commission or its representatives,

and to offer evidence in contradiction thereof

> before judgment of the Commission is rendered thereupon.

It further contends that the evidence to which it demands access contains no trade secrets, within the legal meaning of the term.

Attention has already been called to the evident fact that there is a struggle on between at least one domestic manufacturer of sodium nitrite and the relator, who claims to be engaged in the importation and sale within the United States of the same article of commerce made abroad, over a tariff duty. But the pleadings, in the opinion of the Court, re-

veal that the relator is really acting as a selling agent for at least one foreign manufacturer of the product mentioned. Not only is this the information that the respondent Commission has on the subject, but on pages 55 and 56 of the relator's printed petition it appears that during the hearings before the Commission, counsel for the relator informed the Commission that "we cabled Norway as follows", and then the cable is given, this cable informing "Norway" of the result of the work of the Commission's investigators abroad as to "your cost production," etc. And he also read into the record of the hearing the reply to the cable, which reply contains, among other things, the following:

> On principle, we always refuse publish cost price consequently did not furnish investigators any information enabling them calculate cost price.

Among the data that the relator demanded access to from the respondent Commission and now asks this Court, by its writ of mandamus, to compel the Commission to permit is

> the cost of producing sodium nitrite at the plant of said American Nitrogen Products Company or elsewhere in the United States, and in foreign countries.

Thus it appears that in an investigation undertaken by the respondent Commission to ascertain, among other things,

> the differences in costs of production of articles wholly or in part the growth or product of the United States and of like or similar articles wholly or in part the growth or product of competing foreign countries. (Subsections *a* and *b*, Sect. 315, Tariff Act of September 21, 1922),

we find the relator, on behalf of one or more foreign manufacturers of sodium nitrite, demanding access to data confidentially supplied to the Commission by domestic manufacturers, although its principal or principals have, "on principle," refused to supply the Commission, even in confidence, with the same sort of information. Considering the nature and purpose of the Commission's investigation, this attitude of the relator's principal or principals is not encouraging. It is true that neither the relator nor its principal or principals make any concealment of their attitude in this respect, but stand upon what they claim is their legal right, given, to them, they insist, by applicable and controlling statutes. In the opinion of the Court, it must be very clear that the Congress intended by its enactments to accord such rights, where the assertion of them under the facts of this case, produces the incongruous situation that has been pointed out. Indeed, if the relator is right in its contentions, it would seem as if the purposes of the Congress could be defeated by the attitude assumed in this case by the relator and its principal or principals, and this, too, at the expense of the domestic manufacturer and to the advantage of the foreign manufacturer, a state of affairs that it is almost inconceivable to think that Congress could have intended, when the policy of revenue measures designed to give legal effect to the principles of so-called protective tariff legislation is considered.

Something should be said on the contention made by the relator that its demand does not call for the disclosure of trade secrets. In this regard we find the respondent Commission and the American Nitrogen Products Company declaring that certain of the information, access to which is de-

manded by the relator, *is* information concerning the latter's trade secrets and those of other companies likewise engaged in manufacturing sodium nitrite.

Section 708 of the Tariff Act of September 8, 1916, makes it unlawful for any member of the United States Tariff Commission or for any of its employees

> to divulge, or to make known in any manner whatever not provided for by law, to any person, the trade secrets or processes of any firm, copartnership, or association embraced in any examination or investigation conducted by said commission, or by order of said commission, or by order of any member thereof,

and it penalizes a violation of the section by fine or imprisonment or both. On behalf of the Commission it is insisted that the information and data, access to which it denied the relator, consists of trade secrets. The relator of course insists that it does not.

The information and data thus furnished consists in part, at least, of the original cost and other data collected in the field by the Commission's investigators, the figures showing the details of individual costs of production obtained by the Commission under the sanction of Section 708 of the Tariff Act of September 8, 1916, and original data showing the production costs in respect of labor of the American Nitrogen Products Company submitted by or obtained from the said company under the section mentioned. Also original data relating to the production costs of the said Products Company, similarly submitted or obtained from it. The Commission also denied to the relator permis-

sion to cross examine its experts with respect to the cost data and other matter obtained by them in the course of their investigations in the field.

In the main, the relator insists for a construction of the words "trade secrets" as would confine their use to secret formulas or processes not patented and used in compounding some article of commerce or trade, and there are not wanting decisions which, at least, incline so to confine or limit the applications of the phrase, but the weight of modern judicial authority, in the opinion of this Court, is against so narrow a construction. It seems to the Court that the cost of production of manufactured articles may vary in the proportion to the skill and acumen of individual manufacturers. To illustrate, it is altogether supposable that a given manufacturer or manufacturing concern may so organize his or its production processes as to bring about the greatest efficiency of results as a cost below that which another manufacturer or manufacturing concern of like size and engaged in producing the same article or articles of trade as the former, would be able to do. They are competitors, but the manufacturer whose greatest skill and acumen has lowered the cost of production over that of his adversary has an advantage over the latter which, in fairness, it may be said he has justly earned. Is it the right of the less skillful manufacturer to possess himself by a compelled disclosure of the methods and processes of the more efficient competitor, and thus impair the advantage of the latter in the competitive struggle? It is conceivable that the abler manufacturer may have accomplished his superior position in part by wages, hours, and conditions of labor, and by reducing his

labor turnover. These factors he may be successful in concealing from his competitors, and why may not these methods of his under such circumstances, be justly regarded as "trade secrets"? Of course, in these days of labor union rates of wages, hours, and conditions of labor, this may be an increasingly difficult thing for a manufacturing employer to accomplish, but so long as he is able to do so, is it unjust that the methods he employs be withheld from the knowledge of his competitors? Furthermore the superior ability of one manufacturer over another engaged in the same line of manufacture, which results in a lower cost of production for the former increases the good will of his business, and this good will is a property right which the law will protect and it enters very largely into the price he will receive in a sale of his manufacturing enterprise. Some of the views thus expressed are illustrated in such cases as *The International News Service* v. *Associated Press,* 248 U. S. 215–236, *Board of Trade* v. *Christie Grain and Stock Company,* 198 U. S. 236–250, *Witkop* v. *Boyce,* 61 Misc. 126, 12 N. Y. Sup. 1847, *Crocker-Wheeler Co.* v. *Bullock,* 134 Fed. 241–242–256, and *U. S.* v. *Basic Products Co.,* 260 Fed. 472–482.

More might be written on this interesting subject but the Court at the outset of this memorandum stated that it would undertake to state only *some* of the reasons which has led it to the conclusion that relator's demurrer to the answer of the respondent must be overruled.

And it is so ordered.

F. L. Siddons,
Justice.

April 18th, 1924.

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No. 272

In the Supreme Court of the United States

OCTOBER TERM, 1932

NORWEGIAN NITROGEN PRODUCTS COMPANY,
PETITIONER

v.

THE UNITED STATES

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CUSTOMS AND PATENT APPEALS

MEMORANDUM FOR THE UNITED STATES SUBMITTING REPORTS OF THE UNITED STATES TARIFF COMMISSION, TOGETHER WITH A LETTER FROM THE TARIFF COMMISSION AND SCHEDULES ANALYZING THE REPORTS

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Pursuant to the request of the Court we have filed with the Clerk the reports of the Tariff Commission showing its practice concerning the non-disclosure of cost data obtained in the conduct of its investigations under the Acts of 1916, 1922, and 1930, together with three schedules, A, B, and C, prepared by the Commission, which classify the

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pertinent material to be found in these reports, and an explanatory statement received from the chairman of the Commission, which we believe will be found to be supported by the original reports.

Respectfully submitted.

THOMAS D. THACHER,
Solicitor General.

APPENDIX

UNITED STATES TARIFF COMMISSION,
Washington, January 13, 1933.

SIR: Responsive to your request, the Tariff Commission has prepared a memorandum summarizing the protective measures it has taken throughout the past 15 years in safeguarding confidential information acquired in its investigations. This memorandum it transmits herewith together with detailed schedules A, B, and C, which show the manner in which the cost and other data were handled in each of the individual reports.

The Commission also submits a list and copies of its reports to which reference is made in these schedules, separated into groups; I, in which definite reference is made to the safeguarding of confidential information; and II, in which the practice of the Commission is revealed but is not emphasized in textual statements.

The Tariff Commission in its ninth annual report to the Congress (page 17) and in its sixteenth annual report (page 19) discussed definitely its policy and practice with regard to the safeguarding of confidential information. Copies of these annual reports are also submitted.

Very truly yours,

ROBERT L. O'BRIEN, *Chairman.*

Hon. THOMAS D. THACHER,
Solicitor General, Washington, D. C.

MEMORANDUM SUMMARIZING THE ACTIVITIES OF THE TARIFF COMMISSION IN SAFEGUARDING CONFIDENTIAL INFORMATION

From the beginning the Tariff Commission has held consistently to the rule that information revealing operations of individual firms should not be made public. During more than 15 years of the Commission's existence, under changing administrations and changing personnel, this rule has been constantly in mind. The Census of Dyes and Coal-Tar Chemicals for 1917, on page 11, says: "A schedule was sent to all manufacturers early in January, 1918, asking for detailed figures on the output of each product during 1917. The information thus secured direct from the manufacturers is published in this pamphlet in as great detail as can be given without disclosing the operations of individual firms." From then forward the practice of the Commission has been uniformly to treat individual production costs as trade secrets within the intent and purpose of section 708 of the Revenue Act of 1916 as continued in effect by the Tariff Acts of 1922 and 1930. This is shown not only by the commodity reports but also by the annual reports of the Commission to the Congress. (See Ninth Annual Report, page 17, and Sixteenth Annual Report, page 19.)

This principle has been followed not only because in the opinion of the Commission the law forbids the disclosure of such information, but because of the more fundamental reason on which the law is based, namely, that to disclose the operations of individual firms would so violate business ethics that the efforts of the Commission to obtain information would meet with antagonism and obstruction on

every hand. Domestic field work under the handicap of possible disclosure would be largely superficial, and significant foreign work would be impossible.

The safeguarding by the Commission of the activities of individual firms under the law and business ethics referred to above has covered not only secret formulae and confidential methods of operation, if any, but also production and sales statistics, financial operations, and more especially the identity of the cost of production of individual firms. Cost data as a rule are considered more confidential by business men than any other part of the operation of their business because of their intimate relations to secret processes, methods of production, and the commercially valuable plan of management involving profit-making efficiency.

If the first rule of the Commission is not to make public the operations of individual firms, the second rule, so to speak, is to make available to the Congress and to interested persons all significant data obtained, within the limits of the first rule. From the point of view of public policy, and in order to carry out its functions of informing the Congress and the President of the results of its investigations, it is necessary for the Commission to publish in as much detail as practicable the data obtained as the result of its work within the limits of the rule against disclosure. In the preparation of its reports the Commission keeps these two basic rules constantly before it.

The extent to which detailed information may be published under the law and the Commission's practice obviously depends upon the conditions prevailing in particular industries. When there

are only one or two domestic or foreign firms, relatively little basic information can be published. When there are many foreign and domestic producers much more of the detailed information obtained by the Commission may be made public.

These varying conditions from the point of view of publicity may be illustrated by reference to the Commission's reports during the last 15 years. In some instances where the producers or importers are few in number it has been possible to publish cost data only in the form of percentages, using either the foreign or domestic cost as the base of 100 per cent. In some instances percentage differences in costs only have been published. In perhaps the most numerous list of cases it has been practicable to publish average foreign and domestic costs, calculated from the individual costs of several firms. In such instances care has been exercised to see that even averages are not published when one of the firms is so dominant in the industry from the point of view of volume of production that the average figures would be so close to the cost of the large firm that disclosure would result.

The publication of cost data by companies is usually followed by the Commission where there is a large number of individual producers of the foreign or domestic product. In such cases costs are not only shown for the average of the industry, but also by separate companies, identified by code number or letter. In such instances costs by companies are never published if there are fewer than three represented, nor if there are some peculiarities apparent in the figures which would disclose the operations of individuals. In some instances, for example, it may be practicable to publish total costs by

companies, but not the details of material, labor, and overhead, because the relation among these cost elements might lead to identification of some firms. In all cases where costs by companies are presented the figures showing the quantities of production and similar data are omitted, because in many instances such information would disclose the size, and therefore the identity of the individual firms.

The reports of the Tariff Commission may be grouped into three periods: Those prior to the passage of the Tariff Act of 1922 (September 21, 1922), those on investigations conducted under the Tariff Act of 1922, and the reports on investigations under the Tariff Act of 1930.

During the first of these periods the Tariff Commission's activities were primarily directed toward economic studies with little emphasis upon cost of production. Only in a few of the Commission's reports during this period were cost of production data obtained, but even in this period no costs were published so as to reveal the identity of individual operations.

Under the act of 1922 the Tariff Commission prepared detailed preliminary statements of information for use at the public hearings, but data that would disclose the identity and operations of individual producers were uniformly excluded therefrom. Its final reports too were prepared to follow the policy of publishing all of the basic data not in conflict with the provisions against disclosure of confidential information.

Under the act of 1930, on the other hand, the Commission, in order to expedite the completion of investigations, has adopted the policy of preparing shorter reports and publishing only necessary data

to support the decisions made and conclusions drawn in the report, but in much less detail than in the reports under the Tariff Act of 1922.

An analysis of the Commission's reports indicates that they may be classified into three groups.

(A) Reports in which costs are shown by companies (which are identified merely by number or letter). In this group of reports it was sometimes found feasible to publish the costs by companies for one grade of a product or producing center, but to have done so for other grades and producing centers would have disclosed confidential information, and the data were not so shown. Thus, for example, in the crude petroleum report to have shown the costs for eastern Venezuela alone would have revealed the operations of individual concerns. The costs for eastern Venezuela, therefore, were combined with those of Colombia and a number of other South American countries.

Not only has the Commission followed this practice in cost investigations, but also in other studies. For example, in the Commission's "domestic value" investigation, in which the object was to find the rates of duty on domestic value which would give the same amount of duty collected at the 1930 rates on foreign value, the rates required for the different commodities were shown by companies (identified by code numbers) wherever possible in order to show the range in results. In cases where even such publication of the data for individual companies would have permitted the identification of such companies, or because of the fact that there were only one or two companies, or because one of the companies predominated in the industry, the results were not shown by companies.

In publishing the costs by companies the Commission has sometimes found it necessary to combine certain items where the nature or the amounts of such items would clearly identify certain companies. As, for example, in the report on wheat and wheat products the advertising expense of one company was so large as to make its identification possible and this item was merged with general administrative expenses.

In the egg and egg products survey conducted prior to the passage of the act of 1922, one egg products company with a plant in the United States and also one in China, in support of its contention that the duty on frozen eggs should not be higher than 4 cents a pound in the act of 1922, submitted certain comparative costs to the Commission with full permission to publish them if the Commission so desired, provided the company's name was withheld. These unverified data were published by the Commission—the only instance of this kind in any of the Commission's studies or investigations.

It may be interesting to point out the fact that the Commission in two reports (casein and vegetable oils) in the spring of 1926 gave costs by individual companies (by code numbers) in such detail as to lead some interested parties to believe that they could identify the operations of individual firms. As a result of this experience, the Commission has subsequently been especially cautious in publishing its data by separate companies.

(B) The second group of reports is those where costs are shown merely in the form of averages. Thus in the straw hat investigation in 1931, weighted averages were used for three types of sennit hats. Had cost data been shown by com-

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panies under each type, it might have been possible to identify particular companies.

In the report on the canned tomatoes and tomato paste investigation of 1929, to avoid disclosing individual operations costs for producers in the New York, northern Indiana, and Utah districts were combined. In the report on window glass in 1929, the costs of production for the Fourcault plants and those of the Libbey-Owens plants, to avoid disclosure of confidential information were combined, and the costs of the two hand-cylinder companies were combined, for the same reason, with those of the cylinder process group.

In the report on sodium silicofluoride, the foreign costs of Danish and Holland producers were published in combined form in order to avoid the disclosure of the costs in the principal competing country, Denmark.

In the barium carbonate investigation the Commission obtained costs for three domestic companies. The cost data, however, could not be shown except as weighted averages without disclosing individual operations because the processes used by two companies resulted in by-products which had been credited to total production cost. The third company produced no by-products but had a correspondingly lower material cost. The publication of costs by companies would have permitted the identification of companies because of the different processes used by these companies.

(C) In the third group are those reports in which it was not possible to show any cost data because of the fact that there were fewer than three companies, or the number of companies was few

and one predominated in the industry. Thus in the report on pens the Commission obtained costs for seven separate groups of pens but could not publish these costs "for the reason that in each group costs represent the operation of one or two companies only, in either the domestic or the foreign industry, so that the publication of the data might result in the disclosure of individual operations. Moreover, the publication of combined figures for pens corresponding to the three tariff brackets would likewise involve disclosure of the operations of individual concerns."

In certain of the reports in this group cost differences alone are shown, as in the pigskin leather and the edible gelatin reports of 1931. In other investigations where there is only one foreign or one domestic producer, it was not found feasible even to show cost differences. Thus in the alsimin investigation there was one domestic producer and one foreign producer. Neither costs nor production of these companies could be shown, nor the cost difference, without enabling each company to identify the other company's costs.

Among these reports are also to be found some in which cost details are shown, but because of the limited number of companies the costs are expressed merely as percentages. In the phenol report of 1927 domestic costs were shown merely as percentages of foreign costs in order not to disclose the costs of individual companies.

In the whiting report of 1929 it is stated that "the only comparison possible to make in a report that will not disclose the confidential operations

of the individual manufacturer is a comparison of domestic and foreign cost items in percentages."

In the report on furniture of wood, 1932, it is stated that "the nature of the cost data is such that the absolute costs can not be shown without revealing confidential information." The cost details, therefore, were shown as percentages only.

In the attached tables examples of the Commission's practice in safeguarding the information are presented under the three groups mentioned above and for which a few examples have been given, namely: (A) costs by companies (identified by code letters or numbers only), (B) average costs for the industry as a whole or by areas and grades of product, and (C) reports in which the absolute cost figures are not shown but are represented by percentages, or shown only in the form of cost differences. In a few instances, only the necessary change in duty could be shown.

United States Tariff Commission reports—analysis of protective measures used by the commission in reporting cost data

(A) REPORTS IN WHICH COSTS ARE SHOWN BY COMPANIES (IDENTIFIED ONLY BY NUMBER OR SYMBOL)

Investigation	Date	Page reference	Comments
Reports made prior to September, 1922, under the General Powers of the Commission			
Cost of production in the sugar industry	1919	8, 9, and 46	Cost table is so constructed as to make identification of companies impossible. Blank schedule used in obtaining data states "All answers to the following inquiries will be treated as confidential."
Refined sugar—costs, prices, and profits	1920	24	Large number of companies (12), hence costs identified by symbols could be shown without disclosing identity of company data.
Barium, barium chemicals, and lithopone industries (A4).	1920–21	65, 71, 75, and 80	Cost of barytes and lithopone shown by companies of which there are a large number—barium chemicals, weighted averages only because of the small number of companies.
Eggs and egg products	1922	42 and fol	"In 1916, in one of the largest breaking plants in China, the cost of egg meats delivered at the factory and broken from the shell by factory operatives is stated to have averaged 8.173 cents per pound. In 1916, in a typical domestic plant operating in the Central West this cost, as reported, averaged 15.987 cents." The parent company reporting these costs authorized the Commission to publish them.
Reports made under the Act of 1922			
Wheat and wheat products	1924	22, 24	Advertising costs for one flour mill were unusually large and this item was, therefore, not shown separately but included under general administrative expenses to avoid identification.
Sardines	1925	35	Production of each company is not shown as such information might reveal identity.

(A) REPORTS IN WHICH COSTS ARE SHOWN BY COMPANIES (IDENTIFIED ONLY BY NUMBER OR SYMBOL)—Continued

Investigation	Date	Page reference	Comments
Reports made under the Act of 1922—Con.			
Casein	Mar., 1926		Data difficult to obtain and record complicated. In the Commission's effort to show maximum data, information with respect to such items as cost of milk and sales value of products led some interested parties to believe they could identify individual companies.
Certain vegetable oils (sec. 318)	Apr., 1926		
Coconut oil		7	In addition to cost by companies certain production data were shown by which a skillful mathematician by solving a series of equations believed he could identify certain companies. As a result of this the Commission has exercised even greater precaution in the publication of data.
Peanut oil		45	
Butter	1926	118	Foreign conversion costs shown by companies in the appendix. All costs in body of the report shown as averages only.
Rag rugs	1927	9–17	Costs were shown for individual samples. These were of standard constructions made by many mills, so there could be no identification of any particular sample as the product of any particular mill.
Logs of fir, spruce, cedar or western hemlock.	1928	15–16	Departmental costs and total unit costs are shown for individual domestic and foreign companies referred to by number only but, "* * * The quantity produced by each operation is not shown, as the identity of the costs of certain companies might thereby be disclosed."
Cast polished plate glass	1928	3	Cost by individual plants were shown but as only two companies produced plate glass by the continuous process, the production figures for this process alone could not be shown without disclosing confidential information.
		48, 49	In order to prevent the companies from identifying their own cost data throughout the three years, each company was given a different letter or number for each year for which cost data were obtained.

Eggs and egg products	1929		
(a) Frozen eggs		23	Costs shown by companies.
(b) Dried yolks and dried whole eggs		16	Costs for dried yolks and for dried whole eggs obtained from one company.
Linseed oil	1929	57	"These data, which can not be published without disclosing confidential information * * * have not been included in this report." Large number of producers involved permitted showing of costs by companies.
Reports made under the Act of 1930			
Folding rules:	1932		
Wooden		19 ff	Costs of production and importation of one grade published by companies (identity concealed).
Aluminum		3, 6, 13	Costs not published, as only two domestic producers are represented in average costs. Cost difference was expressed as a percentage of dutiable value of foreign product.
Domestic value—conversion of rates	1932	12	"Where there is a possibility of identifying the operation of individual companies only the final converted rate is published." (This prevents identification.)
		35	"Landed cost data were obtained for the valuation analysis, but can not be shown without disclosing confidential information."
		39, 42, 45–7, 64–6, 68, 72–3, 82, and numerous other pages.	"Data can not be shown by companies without disclosing confidential information."

(B) REPORTS IN WHICH COSTS ARE SHOWN ONLY AS AVERAGES

Reports made prior to September, 1922, under the General Powers of the Commission			
Costs of production in the dye industry, 1918–1919 (T. I. S. 18).	1920	13	No costs given by companies because of probability of identification of individual concerns.

United States Tariff Commission reports—analysis of protective measures used by the commission in reporting cost data—Con.

(B) REPORTS IN WHICH COSTS ARE SHOWN ONLY AS AVERAGES—Continued

Investigation	Date	Page reference	Comments
Reports made prior to September, 1922, under the General Powers of the Commission—Continued			
Wool-growing industry	1921		
Tariff Information Survey J-3 Floor coverings other than wool.	1921	31, 44, 95	Costs shown by group averages only.
Cattle and beef industry in the United States.	1922		
Sheep and wool production in Argentina.	1922		
Reports made under the Act of 1922			
Sugar	1924	16–19	Average costs by years and by areas and countries.
Sugar beets	1924		Costs shown by areas.
Potassium chlorate	1925	7	Weighted average domestic costs compared with weighted average invoice price of imported product.
Print rollers	1925	6–9	Costs published as averages and by types of domestic shops.
Gold leaf	1925	8 ff	Only averages given for 76 shops in United States.
Cotton warp-knit fabric gloves	1925	16–17	Shown as averages, except in one instance where a single foreign sample was used, but as costs were obtained from 5 foreign mills this could not be identified in the form given.
Cotton warp-knit fabric (printed with the report on gloves).	1925	73–75	Costs for the fabric were shown by individual samples without disclosing the identity of the mills.

Live bobwhite quail	1925	5	Costs presented merely in the form of averages.
Men's sewed straw hats	1925	10 ff.	Averages given, by price groups.
Cotton hosiery	1926	24–25, 30, 46–48, 61–74	Pages 61 to 74 show costs of individual samples; previous pages show averages. The identity of the company is not disclosed. Costs were obtained from 55 domestic and 7 foreign companies; as these samples are of standard constructions made by many mills the product of an individual mill could not be identified, especially as the need for uniformity in the Commission's method of handling costs necessitated a regrouping of cost details.
Methanol	1926	14, 20	Costs were shown by 3 geographical areas because of widely varying conditions in each. There were a large number of producers of crude methanol. Costs of refining methanol were shown in the form of averages only of 6 refiners. "As cost data could be obtained for the first half of 1925 from only 1 refining plant, no statement of costs of refining in that period can be made public."
Iron in pigs	1927	15 ff.	Domestic costs published by grades and districts except where to do so would disclose confidential data.
Red cedar shingle industry (sec. 318)	1927	36–47	Costs shown by grades and classes of mills.
Swiss cheese	1927	15 ff.	Detailed costs shown by areas.
Lake fish	1927		Costs shown for various kinds of fish.
Cherries	1927	15 ff.	Growing costs shown by areas and States. Processing costs shown as average only.
Corn	1928	13 ff.	Costs shown by States.
Maple sugar and maple sirup	1928	24 ff.	Costs shown in the form of averages for States and areas.
Onions	1928	35 ff and appendix	Average costs shown by areas and types of onions.
Fluorspar	1928	19, 20, 21, 23, 25	Average costs of certain grades shown.
Barium carbonate	1928	8, 11, 14	Costs for only 3 companies. "Cost data can not be given except as weighted averages without disclosing individual operations. * * * For example the processes used by two companies result in by-products which have been credited to total production costs; the third company produces no by-products, but has a correspondingly lower material cost. Such differences in process result in a wide variation between certain cost items for the individual companies."
Sodium silicofluoride	1928	14, 17	Costs presented only in the form of averages. ("Production costs for Denmark and Holland can not be published separately without revealing confidential information. Denmark's costs, therefore, have been combined with those of Holland in this statement" (p. 13).)

(B) REPORTS IN WHICH COSTS ARE SHOWN ONLY AS AVERAGES—Continued

Investigation	Date	Page reference	Comments
Reports made under the Act of 1922—Con.			
Granite, manufactured and unmanufactured, monumental.	1929	15, 52	Average costs shown by producing districts for all areas except the Pennsylvania district. Pennsylvania costs not shown because cost data were obtained for only two companies.
Milk and cream	1929	22, 24, 25, 26, 27, 34, 35, 36, 38, 39, 44, 70.	Costs presented merely in the form of averages.
Peanuts	1929		
Flaxseed	1929		
Canned tomatoes and tomato paste	1929	30	Footnote, Table 22. To avoid disclosing individual operations, costs for New York district are not shown separately.
		59	Footnote, Table 46. To avoid disclosing individual operations, costs for Utah district are not shown separately.
		62	Footnote under Table 51. To avoid disclosing individual operations, costs for New York, northern Indiana, and Utah districts are not shown separately.
		63	Footnote under Table 53. To avoid disclosing individual operations, costs for New York and Maryland districts are not shown separately.
Window glass	1929	9, 18, 26	Weighted average costs are shown by processes and by areas. The figures for mechanically produced glass include not only the Fourcault plants but also the plant of the Libbey-Owens Co. Costs combined to avoid disclosure. The costs for the two hand cylinder plants are included in the cylinder process group. Costs for these two companies could not be shown separately because of the possibility of disclosing confidential information. Prices for Pacific coast markets obtained from one company only and were therefore not published, the report stating merely their relation to average United States price.

Reports made under the Act of 1930

Crude petroleum (sec. 332)	1931		Weighted averages by States and cost ranges.
Crude petroleum and its liquid refined products (sec. 332).	1931	11, 23, 42, 45	"With the costs for eastern Venezuela were combined the costs obtained for Colombia, Peru, Ecuador, and Trinidad, in order to avoid disclosure of individual company operations." Averages only shown for gas and fuel oils, and gasoline.
Maple sugar and maple sirup	1931	10 and 11	Detailed costs shown by States and areas.
Woven wire fencing and netting	1931	4, 10, 12, 13, 14	Costs published as averages of 11 different grades of netting by regions. Figures for two regions combined to conceal confidential information. "Figures for the Pacific coast district can not be shown separately, as to do so would disclose the operations of individual concerns."
Wood flour	1931	9	
Ultramarine blue	1931	11	Costs are shown by price groups.
Hats, bonnets, and hoods of straw	1931	4, 9	Weighted averages used for three types of sennit hats. Were costs to be shown by companies under each type, it might be possible to identify a particular company.
Wool-felt hat bodies and hats	1931	9	Only averages given.
Smokers' articles	1931	2, 6	Average costs of all companies are shown by price groups. Were data to be shown by companies under each price group, it might be possible to identify costs of a particular company.
Fourdrinier wires, woven wire cloth, and cylinder wires.	1931	9	Average costs shown by size groups.
Olive oil	1931	12	
Bent-wood furniture and parts thereof	1931	8	
Hemp cordage	1931	6–7	Costs shown by group averages.
Dried egg products	1931	12	
Iron in pigs and iron kentledge	1931	14, 15, 16, 17, 18	Domestic costs published as averages.
Crin vegetal, flax upholstery tow, and Spanish moss.	1931	7 ff	Costs shown by group averages.
Lumber	1931	3, 17–22	Average costs are shown in detail by species and geographic regions.
Cylinder, crown, and sheet glass	1931		Average costs at principal markets.
Feldspar	1931		Weighted average costs by areas.

United States Tariff Commission reports—analysis of protective measures used by the commission in reporting cost data—Con.

(B) REPORTS IN WHICH COSTS ARE SHOWN ONLY AS AVERAGES—Continued

Investigation	Date	Page reference	Comments
Reports made under the Act of 1930—Con.			
Cement	1931	4	Weighted average costs of cement by areas.
Cement clinker	1931	4	Costs were obtained for one domestic and one foreign plant only. "These costs can not be disclosed without revealing the operations of individual concerns."
Copper (sec. 332)	1931	34, 68, 70	Average costs shown by operations and by regions. "Cost of mining and concentrating [referring to blister copper] can not be given separately * * * make possible derivation * * * costs of individual concerns." "Details * * * can not be shown without disclosing the operations of individual concerns."
		77	"Small number of * * * operations * * * precludes separate publication of * * * costs."
Fresh vegetables (fresh tomatoes, green peppers, green peas, string beans, lima beans, eggplant, cucumbers, and okra)	1931		
Pineapples	1931		
Creosote oil (sec. 332)	1932	19, 25, 26	Costs shown by price ranges and for districts.
Umbrellas and umbrella frames and skeletons.	1932	3	Costs published as averages of five classes of umbrellas and four types of construction of frames and skeletons.
Infants' wool knit outerwear	1932	22–24	Costs shown by group averages.
Sponges	1932		Costs shown by types.
Vegetable oils and copra	1932	23, 27	Average costs shown for coconut and sesame oils; costs not published for whale oil (2 companies only).
Cotton velveteens and velvets	1932	25–26, 41	Costs shown by group averages. Page references stated are for the mimeographed report; printed report not yet available.

(C) NO COST DATA, OR MERELY COST DIFFERENCES OR DOMESTIC AND FOREIGN COSTS EXPRESSED AS PERCENTAGES OF EACH OTHER

Investigation	Date	Page reference	Comments
Reports made under the Act of 1922			
Sodium nitrite	1924	4 and 5	No costs disclosed because costs were obtained from only two domestic companies.
Barium dioxide	1924	5	No costs disclosed because there were only two domestic producers.
Diethylbarbituric acid	1924	6	No costs disclosed because there were two domestic manufacturers only.
Oxalic acid	1924	4	No domestic costs disclosed because there were two domestic producers only.
Taximeters	1925	5	Comparisons based on two American companies and one German company. "Publications of the costs of production of these companies would reveal the operations of individual manufacturers and disclose confidential information contrary to the provisions of section 708 of the Revenue Act of 1916."
Wall pockets	1925		No cost data shown.
Paintbrush handles	1926	9	Ratio of domestic to foreign costs alone shown. In this investigation the costs for three domestic and one foreign producer were obtained. On page 11 this statement is made: "Table 4, giving the frequency distribution of the cost ratios, contains the only data (cost ratios) that can be shown in the text without disclosing confidential information. * * *"
Cresylic acid	1927	13	"Actual production costs can not be published for either foreign or domestic concerns without disclosing the operations of individual companies."
Magnesite	1927	9	"The prices actually received * * * which the commission is not at liberty to disclose."
		12	"Since the freights paid reveal the operations of individuals they are not presented."
		15	"Because of the small number of producers, actual cost data can not be published by the commission without revealing the trade secrets of individual operators."
		17	"The cost of transportation * * * can not be made public."

United States Tariff Commission reports—analysis of protective measures used by the commission in reporting cost data—Con.

(C) NO COST DATA, OR MERELY COST DIFFERENCES OR DOMESTIC AND FOREIGN COSTS EXPRESSED AS PERCENTAGES OF EACH OTHER—Continued

Investigation	Date	Page reference	Comments
Reports made under the Act of 1922—Con.			
Phenol	1927	8	"Actual production costs can not be published for either foreign or domestic concerns without disclosing the costs of individual companies." Domestic costs expressed as percentages of foreign costs.
Potassium permanganate	1928		Costs shown as percentages because there was only one domestic and one foreign producer.
Whiting or ground chalk and precipitated chalk.	1929	11-12, 26	"The only comparison possible to make in a report that will not disclose the confidential operations of the individual manufacturer is a comparison of domestic and foreign cost items in percentages."
Reports made under the Act of 1930			
Pigskin leather	1931	4	No foreign or domestic costs or comparisons of cost are shown "because to do so would reveal the operations of individual concerns."
		6, 7	"Nor can the commission without revealing the operations of individual concerns make known the production of tanners included in this investigation." Only one domestic producer.
Edible gelatin	1931	6	To avoid disclosure of confidential information only the difference in cost is given. "To guard against disclosure of the Netherlands company's costs, either directly or inferentially, from the average cost of the domestic product, the commission has omitted the detailed cost data from this report." Difference in delivered costs only shown.

Pipe organs	1931	2 and 3	(A) * * * "Inasmuch as there is only one producer in the principal competing country, these costs can not be disclosed." (C) * * * "The excess of the cost of production, including transportation and other delivery charges to the principal markets in the United States, of the domestic product over the corresponding cost of the foreign product, can not be disclosed without revealing confidential information of an individual producer."
		6	"As the costs obtained by the commission from Canada are for a single producer costs of production can be given only in percentages."
Bells, chimes, and carillons	1931	2	"Inasmuch as the costs of production selected as representative of the domestic industry for the purposes of this investigation are those of a single producer, no costs can be published without disclosing the operations of an individual firm." Cost differences only were shown.
Boots and shoes	1931	3	"The * * * costs of production * * * can not be disclosed without revealing the operations of individual foreign concerns." Costs were obtained for one company in Switzerland, two in Czechoslovakia, two in England, and one in Scotland. The differences between domestic and foreign costs were shown as percentages of dutiable value.
Gauge glass tubes	1931	2	"As domestic costs were obtained from only one producer, neither the foreign nor the domestic costs can be disclosed."
		1	"Domestic production of gauge glass tubes can not be stated without disclosing the operations of an individual firm." Only ad valorem duty required to equalize the cost difference was published.
Pens	1931	2	Costs of production not published. "The domestic and the foreign costs of production during 1929 of pens of the seven groups mentioned were ascertained by the commission, but these costs can not be disclosed without revealing the operations of individual concerns."
		8	"Costs for the seven separate groups of pens above mentioned can not be published for the reason that in each group costs represent the operation of one or two companies only, in either the domestic or the foreign industry, so that the publication of the data might result in the disclosure of individual operations. Moreover the publication of combined figures for pens corresponding to the three tariff brackets would likewise involve disclosure of the operations of individual concerns."

United States Tariff Commission reports—analysis of protective measures used by the commission in reporting cost data—Con.

(C) NO COST DATA, OR MERELY COST DIFFERENCES OR DOMESTIC AND FOREIGN COSTS EXPRESSED AS PERCENTAGES OF EACH OTHER—Continued

Investigation	Date	Page reference	Comments
Reports made under the Act of 1922—Con.			
Alsimin, Silicon Aluminum, etc	1932	2	Par. 7 (A) "costs can not be disclosed without revealing the operations of individual concerns."
		5	2d paragraph: "As there is only one domestic producer, statistics of production can not be shown * * *."
		6	Last paragraph: "only one domestic producer, the cost * * * can not be revealed."
		7	4th paragraph: "Inasmuch * * * only one domestic and one foreign producer * * * neither the costs of production nor the cost comparison can be shown."
Furniture of wood	1932	12 ff	"The nature of the cost data is such that the absolute costs can not be shown without revealing confidential information." Cost details were therefore shown as percentages only.
Inedible gelatin, glue, glue size, and fish glue.	1932		
a. Hide glue and extract bone glue		16	Weighted average costs withheld to avoid disclosing costs of one foreign producer.
b. Photographic gelatin		18	Only 2 domestic producers. Details of domestic and foreign costs, expressed as percentages of total f. o. b. plant cost. Difference in costs was shown.
Cocoa-fiber mats	1932		Report shows no costs, only difference in costs.
		19	On page 19 of the report it is stated "The costs of production of cocoa-fiber mats in the United States can not be published in detail without disclosing confidential information." (The reason for this statement was the fact that costs were obtained from only two domestic mills, only one of which made a complete line.)

Optical fire control instruments	1932	4, 11, 15	Costs not published because only one domestic producer. Production figures obtained in investigation likewise not published. Cost differences not published, but shown as a percentage of average foreign value.
Precision drawing instruments, and parts thereof, wholly or in chief value of metal.	1932	2, 3, 16	Costs not published because only one domestic producer. Production figures obtained in investigation, likewise not published. Cost differences not published, but shown as a percentage of average foreign value.
Upholsterers' nails, chair glides and thumb tacks, finished or unfinished.	1932	20, 22, 25	Highest and lowest costs obtained from six producers shown. Costs of one-piece thumb tacks not shown to avoid disclosing confidential data.
Agricultural hand tools	1932	19, 20	Cost of forks, hoes, and rakes not published; differences in cost of individual articles shown. Only two domestic producers, and only one German, and one Swedish manufacturer included.
		28	Costs of shovels, spades, scoops, and drainage tools not shown.
		38, 39, 40	Average costs of foreign and domestic scythes shown.
		46, 47, 48	Average costs of foreign and domestic grass hooks published by grades.
		52	Average costs of domestic corn knives shown. Foreign cost not shown—only one producer. Cost differences not shown.
Blown glass tableware	1932		No cost data shown; duty necessary to equalize costs shown by companies.
Crab meat	1932	13	"As publication of the costs of the two plants would reveal individual enterprise they are not included in this report." The reference here is to one plant in Alaska and one in Virginia.
		16	"Representatives of one Japanese company * * * furnished the commission with records of its costs of production * * *. As publication of these records would reveal individual enterprise, they are not included in this report."
Barley malt	1932	3	Costs were ascertained in accordance with Sec. 336 (e) (1) (A) and (2) (A) but "these costs can not be disclosed since to do so would reveal the operations of individual concerns."
		41	"The commission's cost study in Canada covered the operations of two firms who produce all of the Canadian barley malt offered for sale. In order to keep the costs of these two firms confidential, the commission is presenting in its final table of comparisons the differences in the principal cost items as disclosed by its investigation, and the amount needed to equalize the differences in the costs of production as disclosed by the investigation for each of the two principal markets, as well as for the weighted average of costs for both markets."

LIST OF REPORTS SUBMITTED

I

Annual, commodity, and special reports of the Tariff Commission in which definite reference as to the safeguarding of confidential information is made.

ANNUAL REPORT TO CONGRESS:

Ninth Annual Report of the United States Tariff Commission, 1925.

Sixteenth Annual Report of the United States Tariff Commission, 1932 (Page Proof).

COMMODITY AND SPECIAL REPORTS:

Reports referred to in Schedule A—

Eggs and Egg Products, 1922.

Certain Vegetable Oils, Part I—Costs of Production, 1926.

Logs of Fir, Spruce, Cedar, or Western Hemlock, 1928.

Cast Polished Plate Glass, 1928.

Eggs and Egg Products, 1929.

Domestic Value—Conversion of Rates, 1932.

Reports referred to in Schedule B—

Barium Carbonate, 1928.

Sodium Silicofluoride, 1928.

Canned Tomatoes and Tomato Paste, 1929.

Woven Wire Fencing and Netting, 1931.

Cement, 1931.

Copper, 1931—Report to the United States Senate.

Reports referred to in Schedule C—

Taximeters, 1925.
Paintbrush Handles, 1926.
Cresylic Acid, 1927.
Magnesite, 1927.
Phenol, 1927.
Whiting or Ground Chalk and Precipitated Chalk, 1929.
Pigskin Leather, 1931.
Edible Gelatin, 1931.
Pipe Organs, 1931.
Bells, Chimes, and Carillons, 1931.
Boots and Shoes, 1931.
Gauge Glass Tubes, 1931
Pens, 1931.
Silicon Aluminum, Aluminum Silicon, Alsimin, Ferro-Silicon Aluminum, Ferro-Aluminum Silicon, 1932.
Furniture of Wood, 1932.
Cocoa-Fiber Mats, 1932.
Crab Meat, 1932.
Barley Malt, 1932.

II

Reports of the Tariff Commission in which the practice of the Commission with respect to safeguarding of confidential information is indicated without special reference thereto:

Reports referred to in Schedule A:

Wheat and Wheat Products, 1924.
Butter, 1926.
Casein, 1926.
Rag Rugs, 1927.
Linseed Oil, 1929.
Folding Rules, 1932.

Reports referred to in Schedule B:

Sugar, 1924.
Potassium Chlorate, 1925.
Print Rollers, 1925.
Gold Leaf, 1925.
Cotton Warp-knit Fabric Gloves and Cotton Warp-knit Fabric, 1925.
Live Bobwhite Quail, 1925
Men's Sewed Straw Hats, 1925.
Cotton Hosiery, 1926.
Methanol, 1926.
Iron in Pigs, 1927.
The Red Cedar Shingle Industry, 1927.
Swiss Cheese, 1927.
Lake Fish, 1927.
Cherries (Sulphured or in Brine), 1927.
Corn or Maize, 1928.
Maple Sugar and Maple Sirup, 1928.
Onions, 1928.
Granite, 1929.
Milk and Cream, 1929
Peanuts, 1929.
Flaxseed, 1929.
Window Glass, 1929.
Crude Petroleum, 1931.
Crude Petroleum and its Liquid Refined Products, 1931.
Maple Sugar and Maple Sirup, 1931.
Wood Flour, 1931.
Wool Floor Coverings, 1931.
Ultramarine Blue, 1931.
Hats, Bonnets, and Hoods of Straw, 1931.
Wool-Felt Hat Bodies and Hats, 1931.
Smokers' Articles, 1931.
Fourdrinier Wires, Woven-Wire Cloth, and Cylinder Wires, 1931
Olive Oil, 1931.
Bent-Wood Furniture, 1931.
Hemp Cordage, 1931.

Reports referrred to in Schedule B—Contd.

Dried Egg Products, 1931.
Iron in Pigs and Iron Kentledge, 1931.
Crin Vegetal, Flax Upholstery Tow, and Spanish Moss, 1931.
Lumber, 1931.
Cylinder, Crown, and Sheet Glass, 1931.
Feldspar, 1931.
Fresh Vegetables, 1931.
Pineapples, 1931.
Dead or Creosote Oil, 1932.
Umbrellas and Umbrella Frames and Skeletons, 1932.
Infants' Wool Knit Outerwear, 1932.
Sponges, 1932.
Certain Vegetable Oils, Whale Oil, and Copra, 1932.
Cotton Velveteens and Velvets, 1932.

Reports referred to in Schedule C:

Sodium Nitrite, 1924.
Barium Dioxide, 1924.
Diethylbarbituric Acid and Derivatives, 1924.
Oxalic Acid, 1924.
Wall Pockets, 1926.
Potassium Permanganate, 1928.
Inedible Gelatin, Glue, Glue Size, and Fish Glue, 1932.
Optical and Fire Control Instruments, 1932.
Precision Drawing Instruments, and Parts Thereof, Wholly or in Chief Value of Metal, 1932.
Upholsters' Nails, Chair Glides, and Thumb Tacks, Finished or Unfinished, 1932.
Agricultural Hand Tools, 1932.
Blown Glass Tableware, 1932.

U. S. GOVERNMENT PRINTING OFFICE: 1939

CORRECTED COPY

SUPREME COURT OF THE UNITED STATES.

No. 272.—October Term, 1932.

Norwegian Nitrogen Products Company, Petitioner, *vs.* The United States of America.	On Writ of Certiorari to the United States Court of Customs and Patent Appeals.

[February 6, 1933.]

Mr. Justice Cardozo delivered the opinion of the Court.

On May 6, 1924, the President of the United States determined and proclaimed that an increase in the rate of duty on sodium nitrite was necessary to equalize the differences in the costs of production in the United States and the principal competing country, Norway, and that to that end the duty should be increased from 3 cents per pound to 4½ cents per pound. The proclamation was made after an investigation and report by the United States Tariff Commission under the flexible tariff provisions of the Tariff Act of 1922. Tariff Act of September 21, 1922, c. 356, sec. 315, 42 Stat. 858, 941-943. After the new rate of duty had thus gone into effect, there were new importations of sodium nitrite at the port of New York. The duty was assessed by the customs officers in accordance with the proclamation; and protests were filed by the petitioner, which is the exclusive agent within the United States of the leading exporter to this country of the commodity affected. The protests were made upon the ground that the Tariff Commission in investigating the costs of production in the United States and Norway had not given the petitioner the hearing prescribed by the statute, and that all that followed was of no validity. A judgment of the Customs Court overruling the protests (T. D. 44,824, 59 Treas. Dec. 921) was affirmed by the Court of Customs and Patent Appeals. T. D. 45,674. A writ of certiorari brings the case here.

In October, 1922, the American Nitrogen Products Company submitted to the Tariff Commission a request for a report and recommendation to the President that the duty on sodium nitrite

be increased fifty per cent. It stated in this request that with every reasonable effort to economize it had been unable to compete with the foreign manufacturers and had been forced to close its plant. In response to this request, the Commission on March 27, 1923, ordered that an investigation be made, declared that a public hearing would be held on a date thereafter to be fixed, and gave public notice of its order. The Commission then proceeded to the business of investigation. From the chief producers of sodium nitrite in the United States (the American Nitrogen Products Company and another) the agents of the Commission received the fullest measure of disclosure as to the costs of production and other details of the business. The information as to costs was subject to a pledge of secrecy, the manufacturers taking the position, to which the Commission acceded, that costs were trade secrets, to be withheld from competitors. The chief foreign producers were two, the Norsk-Hydro, a Norwegian company, represented by the petitioner, and the Badische-Anilin of Germany. Both foreign producers refused to supply the investigators for the Commission with any statement of costs, or to permit access to their records. The Norwegian company wrote afterwards in a cablegram to the petitioner: "On principle we always refuse publish cost price, consequently did not furnish investigators any information enabling them calculate cost price." The Commission was hindered, but not baffled. Its investigators went to Norway and consulting other sources of information made an estimate of cost as best they could. By July 20, 1923, the preliminary investigation was over, and the Commission was ready for a public hearing. It gave public notice on that date that on September 10, 1923, all parties interested would be given an opportunity to appear before the Commission, to produce evidence and to be heard with regard to differences in the cost of sodium nitrite and any other facts and conditions affecting the inquiry.

At the time thus appointed, the petitioner appeared, represented by its counsel. It made a motion at the beginning that it receive a complete copy of the request or application for an increase of rates. The copy already furnished to it was not complete, in that the details of the costs of production at the applicant's factory had been left out. The president of the applicant protested that the information as to costs had been given under a promise to hold

it confidential, and the chairman of the Commission thereupon assured him that the promise would be kept. The request of the importer was accordingly refused. The hearing then proceeded, the president of the American Nitrogen Products Company appearing as a witness. He gave general information as to the state of the industry, showing by his testimony that the foreign producers were selling their product in this country at a lower price than they were selling it in their home markets, and showing also that by reason of a difference in the manufacturing process in this country and abroad the foreign producers were able to manufacture sodium nitrite as a by-product, and thus to dispose of it far more cheaply than was possible here. A change of the domestic plant in adaptation to the foreign process would involve prohibitory expense. Counsel for the importer was allowed to cross-examine as to everything brought out at the public hearing. He was not allowed, however, to extract from the witness a statement of the costs of production, the witness again protesting that disclosure of these costs, though it had been made to the Commission in the preliminary investigation, ought not to be made in public for the use of a competitor. At the end of the examination, there was an adjournment of the hearing until September 26.

In the interval, there were other happenings that bear on the merits of the controversy. On September 15, 1923, the Commission made public a report or summary of its information, still omitting, however, any statement as to the costs of production at the applicant's domestic plant. On September 11, it received a letter from the importer's counsel renewing his demand for a complete copy of the application and demanding at the same time that "every particle of evidence gathered by the Commission or its representatives" be submitted to his inspection, and that he be accorded the privilege of examining any and all witnesses, including the field agents of the Commission, with reference thereto. On September 24, the Commission wrote to counsel refusing his request for a disclosure of "every particle of evidence," but stating that the American Nitrogen Products Company had agreed to disclose its cost of production data if the opposition, the Norwegian Nitrogen Products Company, would furnish cost data for the Norwegian product. The importer did not accept this offer. It did not present any excuse for failing to accept it. It did not

even state that it had made any effort to induce its principal abroad to supply it with the necessary data. It paid no attention to the suggestion that disclosure should be mutual, and stood upon its rights, whatever they might be.

On September 26, the hearing went on again. Counsel for the importers submitted copies of cablegrams exchanged between his client and its Norwegian principal. The cablegram from the client informed the principal of the estimate of costs of production in Norway contained in the summary prepared by the Commission. The answering cablegram stated that the estimate was far too low, but confirmed the report of the investigators that information had been refused on the ground that the costs were confidential. That part of the cablegram has been quoted already. The chairman, responding to a request for an adjournment of thirty days, made inquiry of counsel whether definite figures would be obtained from Norway in return for the extension. To this counsel retorted that he was not offering any consideration, nor joining in any barter, but "relying strictly upon the statute." The outcome of the colloquy was an order for an adjournment until October 6. Before this adjournment was taken, counsel submitted five separate requests. Request number one was that his client "have reasonable opportunity to inspect and to be heard upon all evidence which has been offered in this case, not deemed by the Commission trade secrets, or not, in fact, trade secrets." Request number two was to inspect and to be fully heard upon "all the evidence in the possession of the Commission as to the cost of power in the United States in the production of nitrite." Number three was a like request with reference to the number of laborers employed by the American Nitrogen Products Company and the wages paid. Number four was a like request with reference to the capital invested in its plant. Number five was a request that the experts of the Commission be produced for cross examination with reference to the information collected by them in the course of the inquiry, and that the importer be permitted to offer testimony and to be heard in opposition thereto.

At the adjourned hearing on October 6, the Commission announced its ruling with reference to these requests, notice of the ruling having been previously conveyed to counsel for the importer. The decision was in substance that data gathered by the Commission with the understanding that they were to be treated as con-

fidential would be withheld; that the investigators working for the Commission would not be required to produce such data or to be cross-examined about them; but that as to all these subjects of inquiry the importer would be permitted to offer any evidence that it was able to present, and to be heard in oral and written argument with reference thereto. Upon the announcement of this ruling, counsel for the importer stated that he would offer no testimony on behalf of his client but would thereafter file a brief.

On December 12, 1923, before the Commission had reported to the President, the petitioner applied to the Supreme Court of the District of Columbia for a writ of mandamus directing the Commission to disclose the information sought. The petition was dismissed, the court ruling that the action of the Commission had been in conformity with law. An appeal to the Court of Appeals followed, but while it was pending the Commission made a report to the President, and upon the basis of that report the President issued his proclamation for an increase of the duty. The Court of Appeals expressed an opinion, not called for by its judgment, that the information should have been given. It decided, however, that the petition had become moot by force of the action of the President (6 F. [2d.] 491), and so did this court. *United States ex rel. Norwegian Nitrogen Products Co., Inc.* v. *United States Tariff Commission,* 274 U. S. 106. The stages through which the controversy has come to us again have already been described.

The Tariff Act of 1922 (c. 356, sec. 315; 42 Stat. 858, 941) gives authority to the President to increase or decrease the rates of duty specified in the act if he finds upon investigation that increase or decrease is necessary in order to equalize the differences in the cost of production in the United States and elsewhere. It provides (Sec. 315 [c]) that in ascertaining these differences, "the President, in so far as he finds it practicable, shall take into consideration (1) the differences in conditions in production, including wages, costs of material, and other items in costs of production of such or similar articles in the United States and in competing foreign countries; (2) the differences in the wholesale selling prices of domestic and foreign articles in the principal markets of the United States; (3) advantages granted to a foreign producer by a foreign government, or by a person, partnership, corporation, or association in a foreign country; and (4) any other advantages or disadvantages in competition." This provision is followed by

others designed to give protection against hasty or ill-considered changes. There shall be no proclamation under the authority of the statute until an investigation to assist the President has been made by the United States Tariff Commission, which is "authorized to adopt such reasonable procedure, rules and regulations as it may deem necessary." Coupled with these general directions is a mandate more particular which is the petitioner's chief reliance. "The commission shall give reasonable public notice of its hearings, and shall give reasonable opportunity to parties interested to be present, to produce evidence, and to be heard." Section 315 (c).

The decision of this case hinges upon our answer to the question whether the petitioner has been "heard" in accordance with the statute. Does the requirement of a hearing mean that every producer or importer affected by a tariff may explore at will the data collected by the Commission as to the capital, the wages, the cost of material and manufacture, in the business of any other person similarly affected, and may cross-examine investigators and competitors upon the data thus laid bare? If something less than this is exacted, is there still a minimum of disclosure without which the purpose of the hearing will be thwarted altogether, and was this minimum attained by what was done by the Commission here?

1. History, analogy and administrative practice point with sureness to the conclusion that letters of marque have not been issued to every producer or importer affected by a tariff to capture knowledge of the business of every rival so affected in all the intimate details uncovered to the investigating officers.

The appeal to history is a threefold one: to the history of the process of tariff-making by Congress and congressional committees; to the history of this statute in its progress through the Houses; and to the history of this investigating commission and of others that came before.

The process of tariff-making by Congress and congressional committees is not different in essentials from that for legislation generally. If the bill has gone to a committee, the practice has been general to give the privilege of a hearing to business men and others affected by its provisions. The hearing is not one that may be demanded as of right. A change of the tariff laws like a change of any other statute is not subject to impeachment on the

score of invalidity though notice to those affected has been omitted altogether. Luce, Legislative Procedure, p. 143, cf. *Buttfield* v. *Stranahan,* 192 U. S. 470. Even so, the privilege is now so fortified by practice that it may fairly be taken for granted. But the hearing when given is not similar to a trial as conducted in a court. The proponents of a bill and the contestants make their statements for and against, bringing forward such confirmatory documents, trade journals, letters, governmental reports, and what not, as they believe to be important. The kind of information thus supplied can be gathered from the proceedings of the committees that reported the tariff act in question, the Act of 1922, as well as from those leading up to the tariff acts of other years. In none of these congressional hearings has the practice ever prevailed of permitting the advocates of a measure to cross-examine the opponents, or the opponents the advocates, or of compelling the committee itself to submit to an inquisition as to data collected by its members through independent investigation. The committee determines for itself whether its sessions shall be public or private. "Investigations [in Congress] often proceed behind closed doors, for the manifest reason that otherwise some witnesses would not be frank, perhaps would not attend, putting themselves if possible beyond the reach of the committee." Luce, Legislative Procedure, p. 144. It is all a matter of discretion. What is done by the Tariff Commission and the President in changing the tariff rates to conform to new conditions is in substance a delegation, though a permissible one, of the legislative process. *Hampton & Co.* v. *United States,* 276 U. S. 394; *Buttfield* v. *Stranahan, supra; Field* v. *Clark,* 143 U. S. 649. The inference is, therefore, a strong one that the kind of hearing assured by the statute to those affected by the change is a hearing of the same order as had been given by congressional committees when the legislative process was in the hands of Congress and no one else. To be sure there has been a change of sanction. What was once a mere practice has been converted into a legal privilege. But the limits of the privilege were not meant to be greatly different from those of the ancient practice that had shaped the course of legislation.

We have said that the inference is a strong one, yet, of course, it is far from conclusive and might even be inadequate if it were considered by itself. The history of the statute as it passed

through the two Houses of the Congress supplies confirmatory evidence. The bill in its early stages empowered the President to change tariff rates, but said nothing whatever as to the manner in which the preliminary investigation should be made (62 Cong. Rec., pt. 7, p. 7108, pt. 11, pp. 11,155, 11,156, 11,193). A letter from President Harding to the chairman of the Finance Committee of the Senate recommended that Congress name the Tariff Commission as the source of information and recommendation upon which the President might proclaim a change. 62 Cong. Rec., pt. 11, p. 11,211. Several amendments embodying this recommendation were proposed in each chamber of the Congress. No where in the long debates that followed is there a suggestion by any one that witnesses or others appearing in the inquiry should be heard in any other way than according to the customary procedure for investigating bodies. The first amendment named the Tariff Commission as the investigator, but gave no directions as to the mode of action. 62 Cong. Rec., pt. 11, pp. 11,229, 11,232. A second provided that the Commission "shall give such opportunity as it deems proper for the presentation of material facts in each case and arguments thereon." 62 Cong. Rec., pt. 11, p. 11,229. These provisions aroused the fear that at times there might be no hearing, or hearings at which only one side would be permitted to appear. 62 Cong. Rec., pt. 11, p. 11,231. A third amendment, proposed in the Senate, recast the statute by providing that "the Commission shall give reasonable public notice and shall give reasonable opportunity to parties interested to be present and to produce evidence and to be heard," which is in the statute as enacted, and by providing also "said hearings shall be public" and the President shall publish with his findings "the hearings and testimony." 62 Cong. Rec., pt. 11, pp. 11,231, 11,232. These last provisions were omitted in conference, and the section was thus amended to read as it stands today. 62 Cong. Rec., pt. 12, p. 12,627. The omission may have been unwise, but it certainly was not inadvertent. The managers on the part of the House reported (62 Cong. Rec., pt. 12, p. 12,660): "The action of the conferees eliminates the provision of the Senate amendment that the Tariff Commission hearings shall be public and that the President shall make the findings, hearings and testimony in all proceedings public as soon as practicable after the issuance of a proclamation." The

change was criticized in the Senate (62 Cong. Rec., pt. 12, p. 12,888) but in the face of the criticism it was written into the law.

If Congress was unwilling to prescribe a requirement that the "hearings shall be public," or that the President shall publish the testimony when announcing his decision, it is hard to believe that it intended every member of the public affected by an increase or decrease of the duty to inspect and copy all the records and data collected by the Commission, and to cross-examine the investigators as well as the producers or importers appearing at the hearing. If a privilege so far-reaching was to be accorded as a matter of right, there would be a publicity far greater than any that would result from throwing the doors of the hearings open to all who wished to enter. By the Revenue Act of 1916 (c. 463, sec. 706, 39 Stat. 756, 797), the Commission and its agents are given access to any document pertinent to the subject matter under investigation in the possession of any one engaged in the production, importation or distribution of the commodity affected, with power to inspect and copy, to summon witnesses and to administer oaths. If the hearings are to have the scope for which the petitioner contends, all this information is subject to the call of every business rival, unless it comes within the description of "trade secrets or processes." Revenue Act of 1916, sec. 708. It happens in this case that the number of competitors is small. Cases may arise in which it will mount into the hundreds. Any one of these competitors will be free, in the view of the petitioner, to pry without hindrance into the business of the others, for everything collected by the Commission will have the quality of a public record. Not only will there be a privilege to inspect whatever is of record, but the process, it is said, may be carried even farther, by examination and cross-examination as to whatever is thus discovered. The statute does not say that the parties affected by the duty may be present during the preliminary investigation by the agents of the Commission. They are to be present at a hearing, which may be public or private as the Commission shall determine. The statute does not say that they are to have an opportunity to produce evidence and to be heard to whatever extent they may desire. It says that they are to have a reasonable opportunity, and this subject to the power of the Commission to adopt such reasonable procedure, rules and regulations as it may deem necessary. Nothing

in the statute suggests a belief of the lawmakers that every producer or importer was to be viewed, like a party to a lawsuit, as the adversary of every other, with the privilege of examination and cross-examination extended through the series. "There must be a limit to individual argument in such matters if government is to go on." Holmes, J., in *Bi-Metallic Co.* v. *Colorado,* 239 U. S. 441, 445.

Our discussion of the significance of history as an aid to the construction of the statute will be inadequate if it is confined to the history of hearings by congressional committees and to the amendments of the bill in its progress through the Houses. There is need to consider also the history of this Commission before the Act of 1922, and that of earlier commissions organized for kindred purposes.

The powers of the President under the flexible tariff provisions of the Act of 1922 differ in degree rather than in kind from powers that have long been his. By an act of March 3, 1815 (3 Stat. 224), the President was empowered to give effect to a repeal of duties upon imports whenever he was "satisfied that the discriminating or countervailing duties" of the foreign nation affected, "so far as they operate to the disadvantage of the United States" had been abolished. See *Field* v. *Clark,* 143 U. S. 649, 685. Powers very similar were conferred in later years. See, e. g., Act of March 3, 1817, c. 39, 3 Stat. 361; Act of January 7, 1824, c. 4, 4 Stat. 3; Act of May 31, 1830, c. 219, 4 Stat. 425; Act of June 26, 1884, c. 121, 23 Stat. 57; *Field* v. *Clark, supra,* pp. 686, 689.* The Tariff Act of 1890 went farther than those before it. Whenever the President became satisfied that the government of any country producing and exporting certain enumerated articles had imposed duties upon the agricultural or other products of the United States which he found to be reciprocally unequal and unreasonable, he was to have power to suspend the provisions of the tariff law whereby importation of the enumerated articles had previously been free. 26 Stat. 567, 612, c. 1244. Broader still was the delegation of power under the Tariff Act of 1909, which set up a system of maximum and minimum rates with permission to the President to adopt the one set or the other. 36 Stat. 11, 82, c. 6. Under

*For other instances see Comer, Legislative Functions of National Administrative Authorities, pp. 64, *et seq.*

none of these statutes was executive action conditioned upon an inquiry and report by any officer or department. In the fulfilment of his duties, the President consulted whatever sources of information appeared to be appropriate, and when satisfied as to the facts, made proclamation of his action.

The first statute for the appointment of a commission to deal with the problem of the tariff was enacted in 1882. 22 Stat. 64, c. 145. See F. W. Taussig, Tariff History of the United States, 8th edition, p. 231. The Commission, which was to be an investigating body merely, was established as an aid to Congress rather than the President. It was to report at the next session of Congress what changes it thought desirable. After the expiration of its life neither President nor Congress received official aid that was more than desultory or occasional till a body styled the Tariff Board was organized by President Taft in 1909. Taussig, *supra*, pp. 405, 481. This board was established under a provision of the Tariff Act of that year, which by section 2 gave the President a choice between two sets of duties, a maximum and a minimum. "To secure information to assist the President in the discharge of the duties imposed upon him by this section, and the officers of the government in the administration of the customs laws, the President is hereby authorized to employ such persons as may be required." 36 Stat. 83, c. 6. The function of the new board was to investigate and advise. See Taussig, *supra*, p. 424.

The Tariff Board went down at the end of 1912 through the failure of the Congress to provide the ways and means. Taussig, *supra*, 424, n. 1. No similar body was created till the organization of the present Tariff Commission in 1916. Act of September 8, 1916, c. 463, secs. 700, 702, 703, 706, 707; 39 Stat. 756, 795, 796, 797; 19 U. S. Code, secs. 91, 96, 97, 100, 101. Cf. Taussig, *supra*, p. 481. The function of the Commission as first organized was to investigate the administration and fiscal and industrial effects of the customs laws of this country and other kindred problems, to put at the disposal of the President, the Committee on Ways and Means of the House of Representatives, and the Committee on Finance of the Senate, whenever requested, all information, at its command, and to make such investigations and reports as might be requested by the President or by either of the committees or by either branch of Congress. In aid of these purposes and duties, it was empowered to subpoena witnesses and

conduct hearings. The result of an investigation might be a recommendation to Congress that would lead to the increase or decrease of existing duties. There is nothing to show that in conducting these investigations it permitted any interested person to inspect its collected data, or to cross-examine others. On the other hand, it does affirmatively appear, set forth at large in its reports to Congress, that it withheld even from that body disclosure of the costs of production of individual producers, confining its reports to averages and symbols that gave no token of identity. Census of Dyes and Coal Tar Chemicals for 1917, p. 11; Ninth Annual Report, U. S. Tariff Commission, p. 17; Sixteenth Annual Report, p. 19.* From the beginning there has been an administrative policy to treat the costs or investments of identified producers as akin to a trade secret, with the result that disclosure, even if not strictly within the prohibition of the statute (Revenue Act of 1916, sec. 708), was forbidden in the view of the Commission by persuasive considerations of fair dealing and expediency. Congress did not then protest and indeed never has protested, though Congress was the very body for whose benefit the investigation had been made and the reports transmitted. In providing, as it did, in 1922, that a reasonable opportunity for a hearing should be given to any one affected by a change, it had no thought, we may well believe, to prohibit reservations and confidences that would be allowed against itself.

The administrative practice before the Act of 1922 might be too desultory and brief to fix the meaning of the statute if it did not find support, and that unmistakable and ample, in administrative practice afterwards. Consistently through all its hearings the Commission has acted upon the principle that the cost of production will not be made known to competitors if the producers are so few that there can be no disclosure of the cost without disclosing the identity of those producing at that cost. A report by the Commission, submitted by the Government in connection with the briefs, explains the practice that has been followed and the reasons supporting it. At times the reports by the Commission have shown costs identified by number or by letter. This has been done in those instances and those only where producers were so many that identity was cloaked. Even then, it was often

*In the investigations by the Tariff Board of 1909, the practice apparently was the same. H. C. Emery, The Tariff Board and Its Work, p. 14, Government Printing Office, 1910.

necessary to combine the costs in one country, for example, in Eastern Venezuela, with those in other countries, or to combine items of one class, for example, advertising expenses, with items of another class, such as administrative expenses. At times the Commission has resorted to the expedient of showing costs in the form of averages. It has applied the same methods impartially to residents and to foreigners. In one of its reports the foreign costs of Danish and Dutch producers were published in combined form in order to avoid disclosure of the costs in Denmark, the principal competing country. Finally a third group of reports exists where the cost data are not given at all, either directly or indirectly. This has been the form where there were fewer than three companies, or where the number was very small and one predominated in the industry. The reports taken collectively show variations in degree as to the kind and fulness of the information imparted to the public, the variations depending in every instance upon the estimate by the Commission of the effect of the disclosure.* What is more significant than any variations in the reports is a strain of uniformity that runs through all alike. Not in one of them is there a disclosure of the individual data brought together by the Commission through the work of its investigators. Not in one is there the suggestion that the reasonable opportunity for a hearing conceded by the statute carries with it the opportunity to inspect "every particle of evidence" collected by the Commission, and to examine and cross-examine the men who have collected it.

Acquiescence by Congress in an administrative practice may be an inference from silence during a period of years. In this instance the inference is strengthened when it is recalled that during some of those years the Commission was under fire. In 1926, there was a resolution by the Senate for the appointment of a committee to investigate the workings of the flexible tariff. S. Res. 162, 69th Congress. The inquiry was to have "particular reference to the regulations and procedure of the Tariff Commission, the powers exercised and the functions performed by said Commission, and to the institution, investigation, hearing, and decision of cases" arising under sec. 315 of the Act of 1922. United States Senate Hearings, Investigation of Tariff

*The Government has exhibited to the court the original reports as well as a summary of their contents.

Commission, 1926, 1927. In the investigation that followed, the procedure and methods of the Commission were thoroughly explored. One of its members, Mr. Glassie, in his statement to the Committee, explained that it was impossible for the hearing to be "so conducted as to permit of the open disclosure of the individual evidence of costs." United States Senate Hearings, *supra*, p. 529. Indeed, without such explanation, the reservation of these and kindred confidences was made abundantly apparent by records and reports. At the close of the inquiry, the Committee reported to the Senate. Senate Report, No. 1325, 70th Congress, First Session, May 28, 1928. A majority of the Committee advised that the flexible provisions of the tariff act be repealed for the reason chiefly that the President was already overburdened with executive duties, and that the Commission be reorganized as a congressional agency. There was no criticism of the practice whereby the costs of individual producers were treated as confidential. A minority report advised that the Commission be continued and with it the provision for a flexible tariff. Such it seems was also the judgment of Congress as a whole, for despite the majority report of the Committee, the Commission exists today. Tariff Act of 1930, c. 497; 46 Stat. 590, 696, secs. 330-336.*

The administrative practice developed before the Act of 1922 has thus been continued and confirmed with the tacit approval of the President and the acquiescence of the Congress. As late

*There is instruction in the experience of England and Australia.

The English Import Duties Act of 1932 imposed upon an "Import Duties Advisory Committee" as well as upon an existing Board of Trade duties of investigation and advice akin to the respondent's. 28 Chitty's Annual Statutes, pt. I, pp. 93, 94, 99, 100.

Confidential information is protected as follows (sec. 10):

"(1) No information relating to any individual business, being information which has been obtained by the Committee or the Board of Trade by virtue of the provisions of this Act, shall, without the previous consent in writing of the owner for the time being of that business, be published or disclosed except to members of the Committee or to a Government Department requiring that information for the purposes of this Act, or to a person authorised by the Committee or by a Government Department and requiring that information for those purposes, or except for the purposes of a prosecution under this Act."

Australia also has a Tariff Board. At first, there was no requirement of public hearings. Tariff Board Act of 1921. The Board states in its report for the year 1923: "It will readily be understood when representatives of in-

as January 28, 1933, after this cause had been submitted to the court, the signs of acquiescence and approval were strikingly renewed. On that day there was a resolution by the Senate directing a report by the Commission in respect of problems of the tariff. 76 Cong. Rec., pp. 2877, 2878. One of the subjects to be reported was "the range and variety of costs of production related to the quantities produced in each cost range in the United States and in competing foreign countries for each industry investigated by the Tariff Commission since 1920 (so far as can be given without disclosing the costs of individual concerns)". The history of the methods of this investigating body is thus carried down to date. True indeed it is that administrative practice does not avail to overcome a statute so plain in its commands as to leave nothing for construction. True it also is that administrative practice, consistent and generally unchallenged, will not be overturned except for very cogent reasons if the scope of the command is indefinite and doubtful. *United States* v. *Moore*, 95 U. S. 760, 763; *Logan* v. *Davis*, 233 U. S. 613, 627; *Brewster* v. *Gage*, 280 U. S. 327, 336; *Fawcus Machine Co.* v. *United States*, 282 U. S. 375; *Interstate Commerce Commission* v. *N. Y., N. H. & H. R. Co.*, — U. S. —, November 21, 1932. The practice has peculiar weight when it involves a contemporaneous construction of a statute by the men charged with the responsibility of setting its machinery in motion, of making the parts work efficiently and smoothly while they are yet untried and new. *Fawcus Machine Co.* v. *United States, supra.*

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dustries or manufacturers are called upon to give definite details of their costs and manufacture such information must be given confidentially." Third Annual Report of Australian Tariff Board, June, 1923, p. 23. A requirement of public hearings was imposed by an amendment of the statute. Tariff Board Act of 1924, sec. 3. It then became necessary that applicants for increases or decreases "present their cases publicly and on oath." Seventh Annual Report of Australian Tariff Board, June, 1928, p. 14. This does not mean, however, that there is no restraint upon publicity. The same statute provides that upon the objection of a witness, evidence which the Board is satisfied is of a confidential nature may be presented in private if the Board considers it desirable in the public interest to do so. Annals of the American Academy of Political and Social Science, vol. CXLI, January, 1929, Tariff Problems of the United States, pp. 83, 84. The Board evidently considers cost figures to be confidential. Third Annual Report, *supra*. They were so considered, it seems, in the debates in Parliament. 108 Parl. Debates, 3968, 4003 (1924).

To the external aids that are drawn from history and analogy and administrative practice there is to be added another that may be said to be internal, the aid to be derived from the wording of related sections. In the same tariff act that makes provision in these general words for a hearing by the Commission as a step in the development of the process of legislation, there is another section prescribing the remedy available to an importer after the legislative process has been completed, and the question is whether the merchandise has been properly appraised. Act of September 21, 1922, c. 356, sec. 501, 42 Stat. 966; 19 U. S. Code, sec. 381. The remedy in such circumstances is an appeal from the decision of the appraiser to the Board of General Appraisers. The Board shall assign the appeal to one of its members, who shall give reasonable notice of the time and place of the hearing, "at which the parties and their attorneys shall have an opportunity to introduce evidence and to hear and cross examine the witnesses of the other party and to inspect all samples and all papers admitted or offered as evidence." This is the way that Congress spoke when it wished to attach to an administrative proceeding the incidents of a trial in court. There are times when the obscurity of one section as contrasted with the clearness of another may be ascribed to inattention. The need is not perceived of filling up the outlines because what is within them is assumed or carelessly overlooked. Not so in this case where Congress had its attention sharply directed to the fact that plain speech was needed if a hearing was to mean so much. Until it spoke thus plainly, the importer was denied the right to cross-examine and inspect, and this though the privilege of a hearing had been his for many years. It took an explicit statute to overcome the long established policy of the government whereby witnesses testifying to values were to be protected from publicity.* If the dissatisfied importer "is afforded such notice and hearing as enables him to give his views and make his contention in respect to the value of his goods, he cannot

*"It is due to merchants and others called to give such information that their statements shall be taken in the presence of official persons only. It must often occur that persons in possession of facts which would be of value to the appraisers in determining market values are deterred from appearing or testifying by the publicity given to reappraisement proceedings." See the Treasury Instructions of June 9, 1885, set forth in full in Auffmordt v. Hedden, *supra.*

complain." *Origet* v. *Hedden*, 155 U. S. 228, 238; *Auffmordt* v. *Hedden*, 137 U. S. 310.* For years this opportunity for a statement was his only legal privilege, though the effect of the appraisal had a direct relation to his own interests and burdens as contrasted with the interests and burdens that concern the public generally,—though the controversy, in brief, was closer to the field of judicature than to that of legislation. *A fortiori* the privilege is no greater in such a controversy as this where legislation rather than judicature supplies the paramount analogy.

We are not unmindful of cases in which the word "hearing" as applied to administrative proceedings has been thought to have a broader meaning. All depends upon the context. There is no denial of the power of Congress to lay bare to the business rivals of a producer and indeed to the public generally every document in the office of this Commission and all the information collected by its agents. The question for us here is whether there was the will to go so far. The answer will not be found in definitions of a hearing lifted from their setting and then applied to new conditions. The answer will be found in a consideration of the ends to be achieved in the particular conditions that were expected or foreseen. To know what they are, there must be recourse to all the aids available in the process of construction, to history and analogy and practice as well as to the dictionary. Much is made by the petitioner of the procedure of the Interstate Commerce Commission when regulating the conduct or the charges of interstate carriers, and that of the Public Service Commissions of the states when regulating the conduct or the charges of public service corporations. The Tariff Commission advises; these others ordain. There is indeed this common bond that all alike are instruments in a governmental process which according to the accepted classification is legislative, not judicial. *Prentis* v. *Atlantic Coast Line Co.*, 211 U. S. 210, 226; *Keller* v. *Potomac Electric Power Co.*, 261 U. S. 428, 440. Cf. *People ex rel. C. P. R. Co.* v. *Willcox*, 194 N. Y. 383, 386. Whatever the appropriate label, the kind of order that emerges from a hearing before a body with power to ordain is one that impinges upon legal rights in a very different way from the report of a commission which merely investigates

*See Freund, Administrative Powers over Persons and Property, p. 162, and compare pp. 158, 160.

and advises. The traditionary forms of hearing appropriate to the one body are unknown to the other. What issues from the Tariff Commission as a report and recommendation to the President, may be accepted, modified or rejected. If it happens to be accepted, it does not bear fruit in anything that trenches upon legal rights. No one has a legal right to the maintenance of an existing rate or duty. Neither the action of Congress in fixing a new tariff nor that of the President in exercising his delegated power is subject to impeachment if the prescribed forms of legislation have been regularly observed. It is very different, however, when orders are directed against public service corporations limiting their powers in the transaction of their business. They may be challenged in the courts if the effect is to reduce the charges to the point of confiscation. *Smyth* v. *Ames*, 169 U. S. 466. They may be challenged for other reasons when they are without evidence supporting them and are merely arbitrary edicts. *Interstate Commerce Commission* v. *Union Pac. R. R. Co.*, 222 U. S. 541, 547; *Manufacturers Ry. Co.* v. *United States*, 246 U. S. 457, 481; *Nor. Pac.* v. *Dep't Public Works*, 268 U. S. 39, 44; *Chi. & P. Ry. Co.* v. *Public Utilities Comm.*, 274 U. S. 344, 351. Cf. Sharfman, The Interstate Commerce Commission, vol. II, p. 424. The "hearing" that such commissions are to give must be adapted to the consequences that are to follow, to the attack and the review to which their orders will be subject. *Interstate Commerce Commission* v. *Louisville & Nashville R. R. Co.*, 227 U. S. 88, 93; *St. Louis Ry. Co.* v. *Interstate Commerce Commission*, 264 U. S. 64; *Atchison, T. & S. F. R. R. Co.* v. *United States*, 284 U. S. 248. The Commerce Act, as it stands today, and kindred statutes in the states, are instinct with the recognition of a duty to give a hearing of such a kind that the courts will understand why a Commission has acted as it has if their supervisory powers are afterwards invoked for enforcement or revision. No such inference is to be drawn from the act before us now.

The tokens of intention set down in this opinion have a force in combination that is denied to any one of them alone. They impel us to the holding that within the meaning of this act the "hearing" assured to one affected by a change of duty does not include a privilege to ransack the records of the Commission, and to subject its confidential agents to an examination as to all that

they have learned. There was no thought to revolutionize the practice of investigating bodies generally and of this one in particular. Hearings had once been optional. By the new statute they became mandatory. The form remained the same.

2. Our second question must now be answered: If something less is due than inspection without limit, is there a minimum of disclosure without which the purpose of a hearing will be thwarted altogether, and was this minimum attained by what was done by the Commission here?

The argument for the petitioner portrays the American producer in the position of a plaintiff tendering an issue to others which they are called upon to meet like defendants in a lawsuit. The picture is misleading, for in truth there is no lawsuit nor anything akin to it. See the testimony of Mr. Glassie in the investigation by the Senate (U. S. Senate Hearings, p. 516). The Commission, in conducting an investigation, is free to act on its own motion. Indeed it often does so. If it is moved by some one else, the investigation is still its own, the request amounting to a mere suggestion which it is free, in its discretion, to accept or to reject. There is nothing in its rules whereby applicants are placed under a duty to state the figures of their costs, still less to divide the total into items. On the contrary, the rules provide that "an application is not required to be in any special form." It "must state the name, legal residence, business address, occupation and business connection of the applicant, and contain a short and simple statement of the relief sought and the grounds therefor." If it is deemed to be insufficient, "the Commission may permit the applicant to amend the same or to submit evidence orally or in writing." A statement by an applicant that it has been compelled to close its plant because it has been unable to hold its own against foreign competition by reason of disparity of costs in this country and abroad will present a hardship to be investigated if the Commission believes that investigation will be helpful. Certainly there is nothing in any provision of the statute whereby the opponents of an increase may insist that something more than this be shown before they may be called upon to come forward and oppose.

The difficulty is not fully met, however, when we hold that a statement of the costs is not required at the beginning to set the process of investigation going. The question remains whether a

statement in some form, even though fragmentary and stripped of detail, may be necessary later on. The persons affected by the change of duty are entitled to a hearing, and this involves, so it is said, such a modicum of information, such a disclosure of the costs in the form of percentages of the market price or otherwise, as to give notice of the ultimate facts to be contested and overcome. What is required in that view is not a bill of particulars, nor a disclosure of the evidence, but a definition of the issue which is to be the theme of the debate.

The argument thus stated ignores the historic function of the Commission as the adviser of the President or Congress in the business of legislation, and views it as an arbiter between adverse parties litigant. This is to subject its action to the test of an unreal analogy. If the Commission is under a duty to make disclosure of the costs at all, the origin of the duty and its measure are to be found, we think, in this, that since a hearing is required, there is a command by implication to do whatever may be necessary to make the hearing fair. A duty so indeterminate must vary in form and shape with all the changing circumstances whereby fairness is conditioned. The appeal is to the sense of justice of administrative officers, clothed by the statute with discretionary powers. Their resolve is not subject to impeachment for unwisdom without more. It must be shown to be arbitrary.

Arbitrary in this instance it certainly was not, and that for several reasons.

(a) The Commission did not withhold disclosure from the petitioner with any sinister purpose to make the hearing ineffective. It was moved by the belief that a way could not be found of stating the costs without identifying them with the business of a particular producer. In so acting it conformed to its own precedents and practice, and to those of such commissions generally. If it was under a duty to give a hearing similar to one in court, it was bound to expose everything, details as well as summaries. There was then no middle ground. If it was under a duty to give the kind of hearing that was fair in all the circumstances, it was free to shape its course within reasonable limits by its own conception of the promptings of policy and fairness. It would have kept within the statute even though it had made the hearings private and had refrained from the publication of anything, either the records of its agents or the testimony of witnesses. 62 Cong. Rec.,

pt. 11, p. 11, 232. Instead, it made the hearings public, and exposed everything to view except only when publication was likely in its judgment to result in hardship or injustice. Ninth Annual Report, United States Tariff Commission, p. 13; see the Rules of the Commission quoted *infra* in this opinion. There is indeed a possibility that the work of such a body would be seriously hampered if producers were not made to feel that information which in the thought of many is ranked as confidential would be withheld from prying eyes.* Particularly might that be so when inquiry would have to be made of manufacturers abroad, not subject to compulsion.† Business men may exaggerate the importance of secrecy in matters of this kind. Their sensitiveness is to be reckoned with, whether it be reasonable or not.

(b) The attack upon the ruling of the Commission as a denial of a fair hearing in a primary and basic sense is weakened even more when consideration is directed to what the petitioner then asked for.

There was no appropriate motion or objection that brought to the notice of the Commission a claim that apart from any details there was a certain minimum of information due to the petitioner which the Commission was withholding. There is no reason to believe that this minimum was then an object of desire, or that it would have been helpful if conceded. The only statement by the petitioner approaching such a notice was a request that it be furnished with a complete, and not a deleted, copy of the application for relief. The record makes it plain, however, that included in the application were supporting facts and figures giving the costs in fullest detail. The petitioner did not suggest at any time that it would be satisfied with less. On the contrary, its request for a copy of the application was accompanied or quickly followed by a motion setting forth in five subdivisions the particulars exacted, and culminating in a demand that "every particle of evidence" collected by the Commission be held subject to inspection. That was its attitude, made manifest in many ways to the members of the board. That was again its attitude on the petition to the court for a writ of mandamus to hold the Commis-

*See the Reports of the Australian Tariff Board, *supra*.

†See the minority report of the Investigating Committee of the Senate under the 1926 resolutions, Senate Report No. 1325, *supra*, at p. 7. See also Senate Hearings, p. 1086.

sion to its duty. There would be no justice at this late day in invalidating the proceedings for the failure to supply the petitioner with some average or aggregate which it did not state that it cared for, which even now is not explained, and which, in all likelihood, if given, would have added little to its knowledge* Business men as a rule are not wholly in the dark as to the ways of their competitors.

(c) For still another reason the ruling made by the Commission was not an arbitrary refusal to give the kind of hearing that in the circumstances of this particular inquiry was reasonable and fair.

The unwillingness of the petitioner to submit the costs of its Norwegian principal, or to make any effort to submit them, has closed its mouth to the complaint that the refusal to disclose the costs of its American competitor has nullified the report and the proclamation based upon it.

The Norwegian principal, as we have seen, declined to give any information to the agents of the Commission and left them to make up their estimate of the foreign costs from indirect and imperfect sources. The petitioner, to be sure, was an agent, not a principal, yet it was the exclusive agent in the United States, and plainly in a relation that gave it influence, if not authority. Not once during the hearing did it offer to make an effort to obtain the foreign costs and submit them to the Commission under a pledge of confidence or otherwise. Its attitude was one of indifference so complete as to vary hardly at all, or so at least the Commission might reasonably infer, from one of purposeful obstruction.

This attitude of obstruction is not to be ignored in determining whether the information to be imparted to the petitioner was curtailed by the Commission in any arbitrary way. One who seeks equity must do it.

The question in that aspect becomes this: Does justice require that the costs of a domestic producer shall be made known to an importer who is unwilling to use reasonable effort to make disclosure of the costs of his principal abroad? A mind neither perverse nor arbitrary in its judgments might think the answer should be "no."

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*As to other methods available of ascertaining the cost of production with approximate accuracy, see the testimony before the Senate Investigating Committee, p. 1086.

There is left a final question. The petitioner makes the point that the Commission by its own rules has spread its records open to the inspection of interested parties, and that there was a violation of those rules by denying an inspection here. The argument may not prevail. A rule of the Commission does indeed provide as follows: "Parties who have entered appearances shall, prior to the filing of briefs, have opportunity to examine the report of the Commissioner or investigator in charge of the investigation and also the record except such portions as relate to trade secrets and processes." The evidence leaves no room for doubt that the exception stated in this rule has been construed by the Commission as keeping costs secret for the protection of producers, both foreign and domestic, unless disclosure is so cloaked that the identity of the producers will be effectively disguised. Disguise has been found to be impossible when the producers are but two or three. The phrase "trade secrets and processes" is not a new one in the law. It occurs in statutes and judicial decisions as well as in the rule. The Commission was without competence by any decision it might make to fix the meaning of the phrase as used by Congress or the courts. It had power, however, to interpret its own rules and any phrase contained in them. *Evans* v. *Backer,* 101 N. Y. 289, 292; *Duncan's Heirs* v. *United States,* 7 Pet. 435, 451, 452. This it has done by an administrative practice too clear to be misread.

The judgment is

Affirmed.

Mr. Justice McReynolds is of the opinion that the judgment should be reversed.

A true copy.

Test:

Clerk, Supreme Court, U. S.